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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. I. LAMPRECHT and
F. M. AIKEN, Trustees, Appellants,
Petitioners,

VS.

SOUTHERN PACIFIC RAILROAD
COMPANY,
KERN TRADING AND OIL COM-
PANY, and T. S. MINOT, Appellees,
Respondents.

No. 2028
In Equity

BRIEF ON BEHALF OF PETITIONERS
For Certification of a Question of Law to the Supreme Court.

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Filed this.....day of November, 1914.

FRANK D. MONCKTON, Clerk.

By.....
NOV 5 - 1914.....Deputy Clerk.

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Since preparing this brief, it has occurred to counsel that it ought to contain an orderly outline of the principles which control the decision in the Barden case, in their application to the case at bar.

Outline.

1. The grant is created, *in praesenti*, and defined by the granting act, which vested the title in the grantee.
2. No mineral lands can pass by any operation of the granting act, because all mineral lands are excluded from all of its operations.
3. All authority derivable from the granting act, even its authority to do all things necessarily prerequisite to issuance of the patent, and the authority to issue the patent, are all operations of the act; therefore,
4. The government's title to mineral lands, whether known or unknown, cannot be affected by exercise of any such authority.
5. All mineral lands, known and unknown, being so expressly excluded from the jurisdiction derived by the Land Department from the granting act, the issuance of the patent thereunder is not a determination or official declaration that the lands described in it are non-mineral, nor can such patent create a presumption that they are non-mineral; because:
 - A. The Land Department is a special, inferior tribunal.

- B. That Department cannot adjudge conclusively its own jurisdiction.
- C. The records of that Department must show its jurisdiction and its lawful exercise.
- D. The patent issued shows jurisdiction in that Department to issue it and lawful exercise of that jurisdiction; because:
 - (1) It complies in terms and import with the definition of the grant created and defined by the granting act.
 - (2) Its exception and exclusion clause is notice of a restriction and condition of the grant by the granting act.
 - (3) The granting act furnishes no authority to adjudicate the character of mineral lands; because:
 - (a) Such authority, if it existed, would be an operation of the granting act.
 - (b) All mineral lands are excluded from all operations of the act; therefore:
 - (c) All mineral lands would be excluded from that authority to adjudicate, if it existed.

- (4) The fourth section of the granting act directs the issuance of a patent which shall comply in terms and import with the definition of the grant created and defined by the granting act.

E. Neither the patent issued nor the record of the proceedings wherein it was issued, shows jurisdiction to issue a patent not containing a notice of the exception and exclusion of mineral lands contained in the granting act; because:

- (1) Both the patent issued and the records of the proceedings where it was issued show that it was issued wholly by authority of an act of Congress from the authority of which mineral lands were excluded, whether known or unknown; therefore:
- (2) Such act could furnish no authority to adjudicate the character of mineral lands and to omit them from the descriptive part of the patent.
- (3) Neither the patent issued nor the record of the proceedings where it was issued, shows by the recital or otherwise, either:

- (a) That the lands described in the patent had been previously adjudged non-mineral by authority of some law other than the granting act; or,
 - (b) A statement of any kind that the lands are non-mineral.
- (4) The issuance of a patent by authority of an act of Congress from all authority of which all mineral lands are excluded, can neither:
 - (a) Raise a presumption that the lands so patented had previously been adjudged or determined to be non-mineral under some other law; nor,
 - (b) Warrant an official declaration, expressed or implied that the lands had previously been adjudged non-mineral under some other act of Congress, within the operation of which mineral lands are included.

6. The Land Department cannot gain jurisdiction of known or unknown mineral lands, which are excluded by special act of Congress from the jurisdiction derived from that special act, by erroneously adjudicating in the exercise of that jurisdiction, that such lands are not mineral lands because they are not known to be mineral lands.
7. Revised Statutes Nos. 441, 453, 2478, only authorize the Land Department to administer each act of Congress according to its own provisions. Those sections do not authorize that department to transfer the provisions of one act of Congress into another act, nor to import into their proceedings, had wholly under one act, authority derived from other acts, and not derivable from the act under which alone they are proceeding, and so to gain jurisdiction of which they are expressly deprived by the act under which they are proceeding.

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BRIEF ON BEHALF OF PETITIONERS.

This brief is on a petition for certification of a question of law to the Supreme Court, under Section 239 of the Judicial Code. The question petitioned to be certified is:

Does not the provision: "Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this Act * * *" as the same is contained in the Special Act of Congress, approved July 27, 1866, expressly withhold from the officers of the Interior Department, who administer it and the Joint Resolution approved

June 28, 1870, and the grant made thereby, all power and authority to determine conclusively and adjudicate, in any proceedings under said Act and Joint Resolution, what lands are and what lands are not mineral lands?

This Court heretofore certified, on its own motion, to the Supreme Court, in this cause, seven questions of law. The opinion of the Supreme Court thereon, including its answers to those questions, which is made a part of the petition, shows conclusively that, in preparing the opinion and in answering the questions, that Court inadvertently ignored the necessary legal effect of the clause: "that all mineral lands be, and the same are hereby, excluded from the operations of this Act * * *," as it is contained in the granting Act. The result of this inadvertence is, that the Supreme Court answered questions 1, 2, 3, 4, 6, 7, as if "all mineral lands" were only excepted from the grant created and defined by the granting Act, and were excluded only from the grant, and were not in addition thereto, excluded expressly, *in praesenti*, by Congress, in and by said granting Act, from all of the operations thereof; which operations include every phase of every authority derivable from said granting Act.

Such inadvertence of the Supreme Court has placed this Court in such position that it must, under the answers to the questions, and under Section 239 of the Judicial Code, do one of three things:

1. Adjudge in this cause that all mineral lands, which are expressly excluded from the operations of the granting Act, are included within the operations of that Act; or,

2. Certify the above question to the Supreme Court and let that Court either relieve this Court of the necessity of entering such judgment, or explain how things excluded from other things are included within the things from which they are excluded; or,

3. This Court should explain by what authority mineral lands are included within the operations of the granting Act.

For the sake of clearness, the questions heretofore certified are here stated, with the answer of the Court to each question, and the answer which the Court would have been obliged to make to each question, if it had interpreted properly and applied to the case the mineral land exclusion clause contained in the statute.

Questions and Answers.

“1. Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

Answer.—Mineral lands, known to be such at or prior to the issue of patent, were not included in the grant but excluded from it, and the duty of de-

termining the character of the lands was cast primarily on the Land Department, which was charged with the issue of patents.”

The Correct Answer.—No, the grant was created *in praesenti* and defined by the special granting Act. The statute is both the instrument of the grant and the law thereof. It vested in the grantee title to all lands granted by it, and none other, upon the definite location of the road, as this Court has repeatedly held, *Wisconsin R. R. Co. v. Price Co.*, 133 U. S. 496, 507; *St. Paul, Etc., v. Northern Pacific*, 139 U. S. 1, 5; *Deseret Salt Company v. Tarpey*, 142 U. S. 241, 247; *Schulenberg v. Harriman*, 21 Wall. 44, 60; *Leavenworth, Lawrence, Etc., v. United States*, 92 U. S. 733; *Missouri, Kansas, Pacific Railway v. Kansas Pacific Railway*, 97 U. S. 491; *Railroad Company v. Baldwin*, 103 U. S. 426; and mineral lands, whether known or unknown, are excepted from the grant and excluded *in praesenti* from the operations of the Act which authorized the issuance of the patents prescribed in it. *Barden v. Northern Pacific*, 154 U. S. 288, 314-316, 326-331.

“2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (*Noble v. Union River Logging Railroad*, 147 U. S. 165, 174-175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. *McLaughlin v. United States*, 107 U. S. 526; *Western Pacific Railroad Co. v. United States*, 108 U. S. 510.”

The Correct Answer.—No. All mineral lands known and unknown are expressly excluded *in prae-senti* in the granting Act from its *operations*, which include every phase of its authority. They are, therefore, excluded from the authority of the officers to determine or adjudicate their character in proceeding wholly under that Act, because in every such proceeding all their authority is derived from that special Act, and they cannot import into such proceedings under it authority derived from other statutes, and which is not derivable from the special granting Act.

“3. Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Answer.—The mineral land exception in the patent is void.”

The Correct Answer.—No. The mineral land excepting and excluding clause contained in the patent does not except and exclude any mineral lands from

the grant. They were all excluded and excepted from the grant by the granting Act, and that clause in the patent is only notice for record of such exception and exclusion. The Land Department has not power to enlarge the grant created and defined by the granting Act, or to alter the definition of the grant, so as to include any mineral lands, whether known or unknown.

“4. If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?

Answer.—It is conclusive upon a collateral attack.”

The Correct Answer.—The patent which contains the mineral exception and exclusion clause is a conclusive and official declaration of all matters appearing upon its face and is not subject to collateral attack by any one. All mineral lands, whether known or unknown, were excluded from the jurisdiction of the Land Department in the proceedings wherein the patent issued. It is a record importing absolute verity of the act of issuing it, which amounted to an official declaration that all requirements preliminary to the issuance thereof had been properly complied with.

“5. Is petroleum or mineral oil within the meaning of the term ‘mineral’ as it was used in said acts

of Congress reserving mineral land from the railroad land grants?

Answer.—Petroleum lands are mineral lands within the meaning of that term in railroad land grants.”

The above answer is correct.

“6. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Answer.—It does.”

The Correct Answer.—Yes, it would, if he were attacking the patent. But he is not attacking it. He is simply insisting that the patent is valid, according to its terms and import. Neither the granting Act nor the patent purports to convey any mineral lands, known or unknown, and they are not evidence of any title thereto in the grantee named therein. The Land Department can derive no jurisdiction from the granting Act to do anything whatsoever in respect to mineral lands. The patent was regularly and not erroneously issued.

“7. If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title

to such of the lands described in the patent as were in fact mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Answer.—No; such an agreement is of no greater force as an estoppel than the exception in the patent. The latter being void, the patent passes the title, and is not open to collateral attack or to attack by strangers whose only claim was initiated after the issue of the patent.”

The Correct Answer.—Yes, such an agreement would be a mutual and correct interpretation of the granting Act and of the patent issued thereunder, which in form and import complies with the provisions of that Act.

To show that the above questions should be answered as indicated it is necessary only to establish the following

Argument.

I.

THE SPECIAL PROVISION OF THE GRANTING ACT “THAT ALL MINERAL LANDS BE, AND THE SAME ARE HEREBY, EXCLUDED FROM THE OPERATIONS OF THIS ACT * * *” EXCLUDES ALL MINERAL LANDS WHETHER KNOWN OR UNKNOWN, FROM THE JURISDICTION OF THE LAND DEPARTMENT IN ALL ITS PROCEEDINGS HAD WHOLLY UNDER THAT ACT.

The Supreme Court, in its opinion and answers to the questions, made no distinction between the effect of merely excepting lands “reserved, granted,

sold, etc.”, from the grant, and both excepting “mineral lands” from the grant, and in addition thereto, excluding “all mineral lands” *in praesenti*, from the *operations* of the granting Act.

It is very evident that in excepting eight distinct classes of lands from the grant created by the granting Act, and excluding only one of those eight classes from the operations of the Act, Congress intended that such exclusion should have some effect other than and beyond the effect of the exception. The effect of the exception of the lands from the grant would be to authorize the officers of the Land Department to segregate the lands excepted from the lands granted, in their administration of the grant. The Court held such to be the duty of the Land Department in respect to mineral lands. The Court expressly states that they must segregate mineral lands in the same manner as they segregate lands “reserved, sold, granted, etc.” (Opinion 25-26). And the Court expressly states on page 15 of its opinion:

“in this respect no distinction is recognized between patents issued under railroad land grants and those issued under other laws; nor is there any reason for such distinction.”

Of course, it will be conceded that such assertion by the Court will not alter the truth if valid reasons for such distinction exist. Some reasons for such distinction will now be noted.

The circumstances and contingencies against which Congress must provide, in order to retain

title to lands "reserved, granted, sold, etc.", were entirely different than those against which it must provide in order to retain in the Government title to "all mineral lands". Lands "reserved, sold, etc.", constituted seven of the eight classes excepted from the grant. All lands falling within any of those seven classes are excepted from the grant, because some claim or right attached to them, prior to the definite location of the line of the road by the filing of the map thereof in the General Land Office. The making of a record in the Land Office was absolutely necessary to the creation and existence of every claim which could bring any lands within any of these seven classes of excepted lands. Therefore, officers of the Land Department could sit in their offices, at Washington, and by examination of their plats and records, segregate accurately every acre of land falling within any of these seven classes of excepted land. There was not the slightest excuse for any mistake in doing this work.

But what were the circumstances and contingencies against which Congress was under necessity of providing to keep the title of all mineral lands in the Government? Was there any record of all mineral lands? Did the circumstance that they were mineral depend upon the making of a record in the Land Office? The country through which this grant passes was then almost entirely unexplored. No one knew what lands were mineral and what lands were not mineral. The segregation of the mineral lands, within the limits of this grant, could be successfully

accomplished only after a most careful exploration, to accomplish which years and the development of the country would be required. The granting Act required patents to be issued as fast as the road was completed. It is evident that mineral lands could not be accurately segregated from the non-mineral lands before the patents must issue. Congress added, to the exception of the mineral lands from the grant, the exclusion of them from the operations of the Act, in order to prevent the passage of title from the Government of such of the mineral lands as would pass under the exception by an erroneous decision as to their character. This is the only possible explanation of the addition of the exclusion clause to the exception of the lands from the grant. The fact this grantee is now claiming title to an empire of mineral wealth under this granting Act, because of an alleged erroneous adjudication that they were non-mineral demonstrates the wisdom of Congress in inserting the exclusion clause in the granting Act.

Such being the reason for *excluding* "all mineral lands" from the *operations* of the Act, in addition to *excepting* "mineral lands" from the *grant*, what is the necessary effect of excluding them from the *operations* of the Act? What are the operations of an Act of Congress?

An Act of Congress is the authoritative determination of the legislative mind in respect to a subject of legislation. It is a law established by the Act of the legislative power. The Act operates so

long and only so long as it is a law. The operations of this Act are its workings; its processes of action; its performances and procedure; everything it does; its force and effect; its results. These synonyms of the word "operation" denote various phases of the authority of the Act. The plural of the word "operations", used in the statute, includes all of the various phases of the authority of that Act of Congress. These definitions and synonyms of the word "operation" are taken from the Standard Dictionary; they are also given in the dictionaries of the date of the granting Act. This granting Act is a law. The Courts have carefully defined the operations of a law.

In *State v. Greebrick*, 5 Iowa, 491, 496, the Court defines the word "operation" as used in Article 1, Section 6, of the Constitution of Iowa, providing that all Acts of a general nature shall have a uniform operation, to mean: "the practical working and effect of the laws".

In *United States v. Hammond* (U. S.), 26 Federal Cases, 96, 98, the Circuit Court for the District of Columbia, in construing the acceptance, by the United States, of the grant of the District of Columbia, which provided that the operation of the laws of the State within such district should not be affected by the acceptance until the time fixed for the removal of the Government thereto, and until Congress should otherwise by law provide, said:

"A law is always in operation as long as it is the rule of conduct of the subject upon which it is intended to operate; that is, as long as the

subject is bound to obey it, or to conform his conduct to its provisions. The operation of a law can be nothing more than the obligation of a law. The law ceases to operate when it is no longer obligatory, and as long as it is obligatory, it is in full operation. The law would not cease to operate upon citizens of a State, although it should happen that there was neither a Court, a judge nor an officer of justice to punish a breach of such laws. There is a vast difference between the operation of the laws and the execution of the laws. A law may be in operation, and yet, from a defect of courts or officers of justice, it may not be possible to carry it into execution. The operation of a law is a part of its very existence. It ceases to be a law when it is no longer operative.”

The obligation of the law is its binding force and effect, which is the same thing as the authority of a law. Hence, from these definitions and authorities and the use of the plural of the word “operation” in the exclusion clause of this granting Act, the irresistible conclusion is, that Congress intended to and did exclude all mineral lands *in praesenti* from every phase of the authority derivable from the granting Act.

The purpose of this is evident. Mineral lands were at the date of this grant nearly all unknown. They were reserved from every form of sale and disposition until the 26th day of July, 1866, one day before the granting Act was approved. Congress knew that nearly all of these mineral lands were unknown, and that they would remain unknown for years and years to come, and until long after the patents must be issued under this granting Act, and

so excluded them from the operations of the Act. Is the fact that they were unknown a reason for including them? If mineral lands were only excepted from the grant, that would oblige the officers to segregate them, a thing which Congress knew those officers could not do. To meet this difficulty Congress excluded these lands, whether known or unknown, from the *operations* of this Act, which operations include every phase of every authority, which the Land Department can derive from the granting Act. Therefore, those lands are excluded from all jurisdiction of the officers of the Interior Department, derivable from that Act. When those officers administer the grant, they have, in their administration of it, only the authority of the special Act which made the grant and authorized the issuance of patents under it.

The Court insists that it is a *duty* of those officers, created by the granting Act, to segregate the lands granted from the lands not granted, and to include only non-mineral lands in the description of the patent. This is true of lands “reserved, sold, granted, etc.”, because they are only *excepted from the grant*, and *are not* excluded from the *operations* of the Act, which it is asserted creates the duty to segregate. The answer to that assertion is that every such *duty* created by the granting Act is an *operation* thereof, and all mineral lands are, therefore, excluded from that *duty* and from the *exercise* of it, which is also an *operation* of that Act. Every *authority* created and every *duty* imposed by this

Act is one of its *operations*, and mineral lands are not subject to such authority; and such duty can have no application to any of them.

On page 10 of its opinion, the Court cites Rev. Stat., Secs. 441, 453, 2478, and the case, *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 166, 167, to support the proposition that these sections authorize the officers of the Land Department to determine the character of mineral lands, in a proceeding under this special granting Act, and to segregate such lands from the lands granted. Such contention overlooks the fact that each Act of Congress granting lands for some specific purpose must be administered according to its own provisions, and not according to the provisions of some other Act, which Congress has passed for some other purpose, or according to the provisions of some Act which Congress has not passed, but which some executive officer or court *believes* Congress *ought to have passed*. To refrain from adjudicating the character of mineral lands is as much a part of the proper administration of an Act of Congress from the operations of which all mineral lands are excluded, as to adjudicate the character of mineral lands is a part of the proper administration of an Act of Congress within the operations of which mineral lands are included.

When the Land Department administers the homestead laws, they are bound, in their administration of them, by the provisions of those Acts of Congress. When they administer the mineral-land

laws, they have power only to carry the authority of those laws into effect. When they administer the town-site Act, they are bound by the provisions of that Act, in all their proceedings under it, and can derive no authority from any source other than the statute. They cannot change any of the provisions of these Acts. This contention, that the officers of the Interior Department are clothed with a "general authority" by virtue of which they can administer a grant of lands made by a special Act of Congress so as to disregard an express provision of the granting Act, and interpolate into the statute, in its place, another provision meaning exactly the opposite of the one disregarded, is puerile. Executive officers have not the power under the Constitution so to amend the Acts of Congress. It is certainly true that the officers of the Interior Department have authority to administer the public land laws, but this does not mean that they can import into their proceedings, under this special granting Act, authority derived by them from other Acts, which provide for the granting of land for other purposes, and so gain authority and power to adjudicate and determine under this special granting Act, the mineral character of mineral lands when the very Act under which they are proceeding deprives them of all power and authority to determine and adjudicate that question under it. If those officers were permitted so to import authority from one statute to another, they could transfer, under any statute, any lands which they could transfer under any or

all other statutes. The result would be that Congress, who are entrusted, under the Constitution, with exclusive and plenary power and authority over the public lands, would have no authority over them at all. Yet, the Court's opinion quotes and cites cases arising under laws within the operations of which mineral lands are included and in which it was held that those statutes authorize an adjudication of the character of mineral lands, to prove that the officers must also determine and adjudicate the character of mineral lands by the operations of an Act of Congress from all of the operations of which all mineral lands are excluded. Such ruling is erroneous.

There are other considerations which prove conclusively that this exclusion clause removes all mineral lands from the jurisdiction of the Land Department in a proceedings under the granting Act. These considerations can best be noticed by an analysis of the case of *Barden v. Northern Pacific Railroad*, 154 U. S. 288. That case is an absolute authority in this case. The application of its principles to this case would absolutely force a judgment in favor of the appellants.

That case arose under the granting Act of July 2, 1864 (13 Stat. 365). The provisions of that Act are identical with those of this, in so far as they relate to the subject here under consideration. When the Northern Pacific granting Act was in the House for consideration, the Public Lands Committee of the House inserted into it by way of amendment the ex-

clusion clause practically as it appears in this Act. When the bill passed and went to the Senate, it was referred to the Public Lands Committee of the Senate, who reported it with amendments, two of which were as follows:

“After ‘land’ in Line 8, to insert ‘not mineral.’ ”
Another amendment—the fifth—was to strike out the following provision in Section 3:

“Provided further that all mineral lands be, and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and unappropriated, agricultural lands, nearest to the line of said road, may be selected as above provided.”

Congressional Globe, Part 4, First Session,
38th Congress, Senate, page 3290.

The bill as amended was passed by the Senate and returned to the House. The House refused to pass the bill as amended. The Senate appointed a conference committee and instructed it to insist upon the Senate’s amendments to the bill. (Id. 3360.) The House appointed a conference committee. (Id., page 3388.) The committees met in conference and reported back the bill in the present form of the statute. (Id., page 3479.) These records show unmistakably that Congress knew and intended that the exclusion clause would and should have the effect of removing these lands from the jurisdiction of the Land Department *in a proceeding wholly under* the granting Act.

There is one other thing which should be noticed before analyzing the Barden case. It is claimed

that that case is distinguished from this case by the fact that the joint resolution of January 30, 1865, (13 Stat. 567), adds something to the exclusion of mineral lands from the operations of the granting Act.

First, the joint resolution provides "that no *Act* passed", etc., "*shall be so construed* as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the Act or Acts making the grant." Not only is there no difference between the excluding force and effect of this joint resolution and the excluding force and effect of the exclusion clause in the granting Act, but the history of the joint resolution shows conclusively that it was intended to have precisely the same effect as the excluding clause. This resolution was before the 38th Congress, at the First Session, but for some reason was not reported back to the House after it had been passed by the Senate.

Second, the record shows that this resolution was before Congress at the same time that the bill which made the grant to the Northern Pacific was being considered. That granting Act was approved July 2, 1864.

Congressional Globe, Part 4, First Session, 38th Congress, June 28, page 3339, we find the following:

"RESERVATION OF MINERAL LANDS.

Mr. HENDRICKS. I am directed by the Committee on Public Lands, to whom was referred the joint resolution (H. R. No. 99) *reserving*

mineral lands from the operation of all Acts passed at the present session granting lands or extending the time of former grants, to report it without amendment, and I ask for its present consideration.

There being no objection, the Senate as in Committee of the whole, proceeded to consider the joint resolution which provides 'that, no Act passed at the present session of Congress, granting lands to States or corporations, to aid in the construction of roads or for other purposes or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States.

Mr. DOUGLAS I should like this resolution to define exactly what are called mineral lands, otherwise, it will make very great difficulty in our legislation.

Mr. HENDRICKS. The Senator asks why the Committee on Public Lands do not define what is meant by 'mineral lands' in the sense in which it is used here. The Committee favored the resolution as a practical measure. There have been no grants made *this winter*, in which the reservation has *inadvertently been omitted*, except upon a proposition making a grant of land in the region of *Lake Superior*, and there there are no minerals except *copper* and *iron*. It was thought best to *except them* from all grants made in that region of the country."

In the Congressional Globe, Part 1, 2nd Session of 38th Congress, page 360, we find the following:

"MINERAL LANDS.

Mr. HARLAN. A few days before the close of the last session, a joint resolution (H. R. 99) 'reserving mineral lands from the operation of all Acts passed at the present session, granting lands or extending the former grants' was

passed by the Senate, but through some inadvertence was not sent back to the House of Representatives, so that it failed to become a law. In order to secure the object now, some amendments are necessary which I am authorized by the Committee on Public Lands to propose; and to reach that stage I move first to reconsider the vote by which the joint resolution was passed.

The motion was agreed to, and the resolution amended by striking out the words 'present session' and inserting the words 'first session of the 38th Congress' and adding to the resolution 'unless otherwise expressly provided in the Act or Acts making the grant'." (The title was also amended.)

Three things are apparent from this record:

1. That the joint resolution of January 30, 1865, was not intended to apply to the Northern Pacific granting Act, for the reason that Congress considered the exclusion clause thereof as effective as the joint resolution, itself, "reserving mineral lands from the operations of all Acts, etc.", *supra*.

2. The resolution was intended to apply to some particular grant on the shores of Lake Superior, from which inadvertently mineral lands had not been excluded. The record so states.

3. The joint resolution was before Congress at the same time that the Northern Pacific granting Act was before it, and, if Congress had not considered the exclusion clause of the Northern Pacific granting Act as broad and effective as the joint resolution, it would have changed that granting Act by amendment. This is also shown by the fact that

in making the grant now under consideration, Congress copied exactly the language of the Northern Pacific granting Act with reference to the exclusion of mineral lands and added no new provision. The record says:

“There have been no grants made this winter, in which the reservation has inadvertently been omitted, except upon a proposition making a grant of lands in the region of Lake Superior, and there there are no minerals except *copper* and *iron*. It was thought best to except them from all grants made in that region of the country.”

Iron is not a mineral within the meaning of the Northern Pacific granting Act, hence, this resolution could not have been intended to apply to it to reserve iron and copper in the upper peninsula of Michigan. Nothing could be clearer, both from the language of the resolution and of the record of its consideration, that it has no more force than the excluding clause now under consideration to remove mineral lands from the jurisdiction of the Land Department. So the Barden case differs in no respect whatever from the case at bar, as to the law which governs the title to mineral lands.

That case was presented to the Supreme Court on writ of error, by the defendants who were claiming under the mineral-land laws to reverse judgment against them in the lower Court on demurrer to the complaint of the railroad company in an action of ejectment. The company claimed the lands under its granting Act, alleging that they were not

“known” to the mineral until after the road was definitely located, built, examined by the Commissioners, approved and accepted as constructed in compliance with the granting Act. The disputed lands, which were within the primary limits of the grant, had been selected by the company, listed with the local Land Officers, and by them certified to the Commissioner of the General Land Office. The lands had been surveyed. After all these things had been done, but while the issuance of patent was delayed, citizens discovered mineral on the excluded lands, and located them under the public mineral-land laws. It was admitted that the lands were in fact mineral. No patent had issued. Such were the admitted facts of the Barden case.

The question of law presented to the Court was whether the railroad company or the mineral claimants were entitled to possession of the land, and to acquire title to it. The inquiry of the Court naturally was narrowed to the questions:

1st. The inclusiveness of the phrase, “all mineral lands”.

2nd. When the mineral character of mineral lands should be finally determined and adjudicated.

3rd. By whom and by what authority this decision should be made.

The railroad company insisted that only lands *known* to be mineral at some definite “point of time” in the proceedings under the Act, were thereby “excepted from the grant”, and that such time

was when the grant attached by the filing of the map of the definite location of the line of the road. The railroad company admitted in that case, as follows:

“1. The whole question turns upon the definition of mineral lands. It is only lands ‘not mineral’ which are granted by the Act. No mineral lands can pass by it” (page 305).

The mineral claimants insisted that only lands known to be mineral at the time of the issuance of the patent were excepted from the grant, and that the issuance of a patent including unknown mineral lands included them within the grant, which was created and defined by the statute, which conveyed the title at the date of the definite location of the road, as of the date of the granting Act.

The Court decided:

1. That Congress excluded mineral lands from the operations of the granting Act to remove any doubt of the intention to confine the concession to non-mineral lands (page 312).

2. That the joint resolution of January 30th, 1865 (13 Stat. 567), “cut off every possible suggestion by way of ingenious and strained construction, that mineral lands might be reached under legislation giving vast tracts of public lands to states and corporations, under pretense of aiding public improvements” (page 312).

(As we have seen, the legal effect of the resolution to exclude was the same as the excluding clause in the granting Act.)

3. That the ascertainment of the section specified in the statute, in no respect affected

the nature of the lands or the conditions on which the grant was made (page 313).

4. It was still, as such grant (a present one), subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed (page 313).

5. The exception of mineral land was "declared in the creation of the grant" (page 313).

6. The other exceptions "in no respect affected that one or limited its operation".

7. The exception of mineral lands *cannot be limited by inference* from any language in the statute "*in the face of its declaration that all mineral lands are thereby 'excluded from its operations'*". And the joint resolution of January 30th, 1865, is to the same effect (page 314).

8. Congress had power to create and did create, by the granting Act a title which by its very nature and definition could not attach to any mineral lands, whether known or unknown (314, 315).

9. In no decision of the Supreme Court "was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of mineral lands then undisclosed." The grant did not exist without the exception of minerals therefrom (page 316).

10. The grant is limited to lands not mineral at the time of grant, and was coupled with the condition of the statute, that all mineral lands are excluded from its operations (316).

11. Mineral lands were not conveyed, but were by the statute and resolution reserved to the United States and excepted from the operations of the statute (page 316).

12. Mineral lands "were not to be located at all, and if in fact located they could not pass under the grant" (page 316).

13. Mineral lands are absolutely reserved from the inception of the grant (page 316).

14. The word "known" cannot be inserted in the Act of Congress by construction, "either to limit the extent of its grant or the extent of its mineral" (page 317).

15. "To change the meaning of the Act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is in terms prohibited" (page 317).

16. The omission of the word "*known*", as defining the extent of the mineral lands excluded, was purposely intended (page 317).

17. "It is impossible to admit that Congress intended that its exclusion of mineral lands should be defeated" (page 318).

18. The Act of Congress does not provide that selections of the lands by the plaintiff, as part of its grant, shall in any respect change its purpose and effect and eliminate any of its reservations; nor does it empower the officers of the local Land Office to accept the list as conclusive with respect to such grant in any particular (page 321).

19. The Court then distinguishes *Deffenback v. Hawke*, 115 U. S. 392, and *Davis v. Webbald*, 139 U. S. 507 (pages 322-324).

As these rulings of the Court seem to dispose completely of every question of law presented by the record in the *Barden* case, no patent having issued, all written in the opinion in respect to the effect of the issuance of a patent, is *obiter*, unless it is construed to apply to some matter before the Court on the record. It may, however, be advantageous to consider even this alleged *obiter* carefully, because it was intended to point out a "means by which

and a time at which'' the character of mineral lands within the limit of the grant could be conclusively determined. That case was twice argued and decided by a divided Court. There should be no *obiter* in the opinion. In considering the opinion, however, certain things should be constantly kept in mind.

The controversy being considered by the Court in that case was, as in that case, between claimants under the granting Act and claimants under the mineral-land laws. The railroad company was insisting that the officers of the Interior Department *had no authority*, under the facts of that case, to determine, on application *under the mineral-land laws*, that the lands were mineral and therefore "excepted from the grant",—the lands having been certified for patent by the local Land Office. On the other hand, the mineral claimants and the Solicitor General were insisting to the contrary, and also that those officers had authority to determine conclusively and adjudicate the mineral character of mineral lands *in a proceeding wholly under the railroad's granting Act* up to the issuance of patent, and not afterwards, and that such adjudication was conclusive in the absence of fraud.

It was not necessary for the mineral claimants, in that case, to show more than an *exception* of mineral lands from the grant. The strenuous argument of the railroad company on "the uncertainty in the titles of the country", which would result from the "exception of unknown mineral lands

from the grant” seemed to render it expedient for the mineral claimants not to call the Court’s attention to the fact that, all mineral lands were not only excepted from the grant but were, in addition thereto, excluded from the *operations of the Act*, which rendered impossible the adjudication of their character by the operations of that Act. Such argument was, in that case, not only unnecessary, no patent having issued, but it would strengthen the argument of the railroad company on the uncertainty of titles and might induce the Court to interpolate into the statute the word “known” as limiting the “exception of mineral lands from the grant”. On the other hand, the railroad company evidently feared to show the legal effect of this excluding clause to strengthen its argument on uncertainty of title, because a proper interpretation and application of it would put them out of Court instanter and establish a rule which would forever bar them from obtaining title to coveted mineral lands, under their granting Act, by any means. So, this exclusion clause was so thoroughly disguised in sophistry that it resembled an “exception”. The discussion of the effect of a patent in the opinion in the Barden case, read with these circumstances in mind, is easily understood. It begins on page 326, where the Court says:

“We do not think any apprehension of disturbance in titles from the views we assert need arise.”

“The views we assert”, it must be remembered are that unknown mineral lands are excepted from

the grant and therefore not granted, and are excluded from the operations of the Act, and therefore, "if in fact located cannot pass under the grant"—"mineral lands" being absolutely reserved from the inception of the grant.

It cannot be assumed that the opinion in the Barden case was written about some imaginary case and not in respect to the rights and interests of the parties to the controversies before the Court. What the Court has to say in that opinion relative to the effect of a patent is readily understood if confined strictly to the controversy between the parties then before the Court. If not so confined, it seems to be *obiter dictum*, and inconsistent at that, with the provisions of the statute and with the other parts of the opinion of the Court and parts of it inconsistent with other parts. There have been so many different constructions placed upon this portion of the opinion, that it seems best to give it some careful attention to determine the exact import of it, although the task may be tedious.

At page 226, the Court says that the contention of the plaintiff arises from an unfounded apprehension that the Court's interpretation of the granting Act would lead to great uncertainty in titles of the country, and "we do not think that any apprehension of disturbance in titles from the views we assert need arise".

"The *law* (not the granting Act) places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting

the disposition of public lands of the United States and the adjustment of private claims to them *under the legislation of Congress*” (Rev. Stat., §§ 3441, 453, 2478).

That sentence was certainly written in regard to the claims of the litigants then before the Court, and the Court proceeds to state how their controversy can be settled before the Land Department:

“It can *hear contests* and decide upon the respective merits of their claims. It can *investigate* and *settle* the *contentions* of all persons with respect to such claims. It can *hear evidence* upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can *issue to the rightful claimant the patent provided by law*, specifying that the lands are of the *character* for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, agricultural lands or mineral lands, and designate them in the patent which it issues.”

It would be difficult indeed for one to describe more accurately the duties of the Land Department in a contest between private parties over public lands sought to be entered under different Acts of Congress. The Court says they can investigate, settle contentions, hear evidence, determine the character of the lands, issue the patent to the party entitled to it and specify the character of the land in the patent. The Court is answering the contention of the railroad company, which was that no mineral lands could pass under the grant, and that therefore mineral lands must be so defined as not

to include unknown mineral lands, but the Court does not state, nor is this language open to the inference that, the *granting Act* confers authority for the determination of the character of mineral lands. The opinion continues:

“The Act of Congress making the grant to the plaintiff provides for the issuance of a patent to the grantee for the land claimed, and as the *grant excludes mineral lands in the direction for such patent to issue*, the Land Office can examine into the character of the land and designate it in its conveyance.”

This was written in reply to the argument of the railroad company, that the officers of the Land Department had no authority to determine that the land in controversy was mineral land and to patent it to the mineral claimants under the mineral-land laws, because the patent, to which the railroad company was absolutely entitled, whatever its form and import, was due to be issued before the land was known to be mineral land. The Court says that the grant (granting Act) “excludes mineral lands in the direction for the patent to issue”, and gives this as a reason why the officers have the power to hear the contest between the railroad company and the mineral claimants, and to award the land to the railroad company if it is shown to be non-mineral, and to the mineral claimants if it is shown to be mineral. But the Land Department is, in that contest, clothed with the authority of the mineral-land laws because one of the contestants is proceeding under those laws. It

is true that the fourth section of the Act excludes mineral lands in the direction for the patent to issue, because it provides for the issuance of patents "as aforesaid" *confirming "the right and title to said lands situated opposite to and co-terminous with said completed section of said road"*, and that "patents shall be issued to said company *conveying the additional sections of land as aforesaid*". (In quoting this fourth section of the statute, the advance sheets of the Supreme Court omit the word "as" before the last-quoted "aforesaid", which changes the entire meaning of the sentence by making the word "aforesaid" modify "sections" instead of modifying the participle "conveying".) Thus the fourth section provides that the patent shall conform to the grant, and shall convey, as the granting Act conveys, excluding all mineral lands. As all mineral lands are excluded from the authority of the granting Act, they are excluded from the authority of the officers to patent them, or to determine their character, or to do anything whatsoever about them *in a proceedings wholly under the granting Act*. The land in controversy was admitted to be mineral land. "The Land Office can examine into the character of the land, and designate it in its conveyance."

Continuing, the Court says:

"It is the established doctrine expressed in decisions of this Court that wherever Congress has provided for the disposition of any portion of the public land of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertain-

ment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

To support this proposition the Court cites and quotes from *Smelting Company v. Kemp*, 104 U. S. 636, 640, 641, and *Steele v. Smelting Company*, 106 U. S. 447, 450, both of which cases arose in respect to conclusiveness of patents issued under the mineral-land laws. These cases were cited and quoted from in reply to the railroad company's argument, page 305, et seq., that the Secretary of the Interior had no authority of law to determine conclusively the character of mineral lands within the concession created by the statute. The very circumstance which made it possible for the railroad company to advance this argument was that all mineral lands were excluded from the *operations* of the Act which deprived the Secretary of the Interior of all authority or jurisdiction over mineral lands, in a proceedings wholly under the granting Act. The Court had already held on pages 313, 314:

"Whatever the location of the sections and whatever the exceptions then arising, there remained that original exception (of mineral lands) declared in the creation of the grant. The location of the sections and the exceptions from other causes *in no respect affected that one*, or limited its operations. There is no language in the Act from which an inference to that effect can be drawn *in the face of its*

declaration that all mineral lands are thereby 'excluded from its operations', and of the joint resolution of 1865, etc."

The Court holds in this passage that the exclusion of mineral lands from the operations of the Act precludes all *implication* from any language in the Act that any mineral lands are within any authority derivable from the Act.

Again, after distinguishing *Deffeback v. Hawke*, *supra*, as a case in which the statute excluded only known mineral lands from the power to acquire title, the Court said, in the *Barden* case, page 323:

"But that case has no bearing upon the present one involving the construction of an Act of Congress declaring in express terms, that *no mineral lands* shall be conveyed by the grant made."

Also, after distinguishing *Davis v. Weibbold*, *supra*, as a case in which the terms "mine" and "valid mining claim" included only lands known, at the date of sale, to be mineral, the Court says, page 324:

"There is a marked distinction between that case, under the town-site law, and the present case, under a grant of Congress, excluding mineral lands from its operation although it is conceded that some of the language used (in *Davis v. Weibbold*) is broader than the necessities of the case required. Yet, the *effect given to the town-site patent* will be found not inconsistent with the views hereafter expressed in the present case."

It will be noticed that in these passages the Court uses the word "grant" and the word "Act" inter-

changeably, and the point upon which the cases are distinguished is that they were cases in which only *known* mineral lands were removed by the statute from the power of the grantee to acquire the land, while in the Barden case, *all* mineral lands were removed by the statute from *every* power or authority derivable from it.

To continue analysis of the latter portion of the opinion in the Barden case: the Court points out on pages 327, 328, that the character of the disputed mineral lands can be determined in a contest between the parties before the Land Department, under the mineral-land laws, because under those laws the department has jurisdiction to determine whether the lands are or are not mineral lands. The fact that the defendants were claiming the lands in controversy under the mineral-land laws would, in a contest, between them and the railroad company clothe the Land Department with the authority of those laws. They were the only laws under which any lands within the grant could be claimed after the map of definite location was filed.

The Court then cites and quotes from *Heath v. Wallace*, 138 U. S. 573, 585, to show that the decision of the department “upon matters of fact *within its jurisdiction* are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country”. Then the Court says in the next sentence:

“If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or

because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are accepted because they are mineral lands. It has always exercised its jurisdiction in patenting lands, *which were alleged to be mineral*, or in refusing to patent them because the evidence was insufficient to show that they *contained minerals* in such quantities as to *justify the issue of the patent.*"

Will any one assert that the Court meant, by this passage, that lands alleged to be mineral were to be patented to the railroad company, or that patents were to be refused the railroad company because the evidence was insufficient to show that they contained mineral? The Court is pointing out that the character of mineral lands can be determined in a contest before the department, and that if the department determines, by authority of the mineral-land laws, that they are non-mineral, it can patent them to the railroad company. The Court then cites and quotes from *Knight v. Land Association*, 142 U. S. 161, to show that the Land Department has authority under laws within the operations of which mineral lands are included, to eliminate them from the lists filed by the railroad company under its granting Act. Then the Court continues:

"There are undoubtedly many *cases arising before the Land Department* in the disposition of the public lands where it will be a matter of much difficulty on the part of the officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral

or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

It is perfectly clear from this portion of the opinion that the Court was speaking of a determination of the character of the lands in a contest before the Land Department. The Court was answering the contention of the railroad company in the Barden case, that as the granting Act excluded mineral lands from its operations, they were removed from the authority of the Land Department, and that a definition must be given by the Court to mineral lands which would not include unknown mineral lands, in order that "a point of time" might be fixed at which the grant would attach to mineral lands then unknown to be mineral (see pages 305, et seq.). The Court says that these matters must be determined under the mineral-land laws, which Congress enacted with provisions suitable for the determination of the character of mineral lands, and the Court cites and quotes from *Central Pacific Railroad Company v. Valentine*, 11 Land Decisions, 238, 246, which was a contest case between mineral claimants and the railroad company, to show that the Land Department had jurisdiction under the mineral-land laws, in such contest, to adjudicate the character of mineral lands, and that such adjudication, and a patent issued thereon, would stop the Government.

Then the Court says:

“It is true that the patent has been issued in many instances without investigation and consideration which the public interest require; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them.”

This language is not open to the inference that the Court meant that the character of mineral lands should be adjudicated by the operations of the granting Act, from the operations of which they are excluded expressly in that Act.

The Court continues:

“The fact remains that *under the law* the duty of determining the character of lands granted by Congress and stating it in the instruments transferring the title of government to the grantees, reposes in the officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it *will not comply* with the Act of Congress in which the grant before us was made to plaintiff.”

The insistence of the Court, that the character of the land must be stated in the patent, arises from the fact that the Land Department is a special, inferior tribunal, having limited jurisdiction under the various statutes, and nothing is presumed in favor of this jurisdiction. It is not a court of gen-

eral jurisdiction and no presumption can arise that it has adjudicated the character of mineral lands in a proceedings under an Act from the operations of which mineral lands are excluded; nor can any presumption arise, from the issuance of patent, under such Act, that the department has adjudicated, under some other Act, that the lands are non-mineral. Hence, the Court insists that the character of the lands, as non-mineral, must be stated in the patent to the railroad company. The principles of law which govern these matters are discussed and explained in *Grignons v. Astor*, 43 U. S. 319, 340-341, where the Court says:

“The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and whose proceedings are nullities if their jurisdiction does not appear on their face is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to final judgment, without setting forth in its proceedings the fact and evidence on which it is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection beyond the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities.”

The same matter is discussed in *Voorhees v. Bank of United States*, 10 Peter, 473, 474-475, and

in *Wilcox v. Jackson*, 13 Peter, 498, 511. In the latter case the Court says:

“The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al. v. Peirsol et al.*, 1 Peters, 340, in these words: ‘where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable but simply void.’”

It is apparent from these authorities that it cannot be presumed that the officers of the Land Department have determined and adjudicated that the lands in controversy in this case are non-mineral, or that the issuance of the patent is a determination that they are non-mineral, in the face of the fact that mineral lands are excluded from the operations of the granting Act under which the patent was issued; and in the face of the fact that the patent does not state that the lands are non-mineral; and in the face of the fact that the mineral lands exception and exclusion clause is contained in the patent.

Now, to continue with the analysis of the opinion in the *Barden* case, the Court says:

“The grant even when all the Acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by the officers of the Land Department, charged with

its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the offices of the department, would be conclusive in subsequent proceedings respecting the title.”

To have this effect, the patent must be “in proper form, upon a judgment rendered after due examination”. This language was written by the Court concerning the lands in controversy before it. They were claimed by the railroad company under its grant, and by the defendants under the mineral-land laws. The Court was pointing out that the Land Department had authority in a contest between these parties to issue a patent in proper form upon a judgment rendered in such contest, in which the officers were clothed with the authority of the mineral-land laws, and that such determination and patent thereon would estop the government from contending that the lands were mineral lands, if the determination was that the lands were non-mineral and patent issued thereon to the railroad company. The last quotation above closes the Court’s discussion of that subject with one exception. The next paragraph of the opinion is as follows:

“The delay of the Government in issuing a patent, of which great complaint is made, does not affect the power of the company to assert in the meantime, by possessory action (as held in *Deseret Salt Company v. Tarpey*, 142 U. S. 241), its right to lands which are in fact non-mineral. But such delay, as well observed, can-

not have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The Government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an *opportunity to have the country*, or that part of it for which a patent is sought, *sufficiently explored* to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

The "opportunity" referred to here is the "due examination" mentioned in the previous paragraph. The examination due this subject is that provided for by the mineral-land laws, which specify the procedure for the determination of the character of mineral lands. The "declaration in the patent, which would be taken as its determination, that no mineral lands exist therein," refers to the judgment rendered in a contest according to the rulings of the Court in the previous paragraph of its opinion. The necessity of stating the non-mineral character of the lands in the patent arises from the fact that the Land Department is a special tribunal, having limited jurisdiction, inferior in the technical sense, and therefore the issuance of a patent under the granting Act, from the operations of which mineral lands are excluded, could raise no presumption that a decision has been rendered by that department, under some other Act, within the operations of which mineral lands are included, that the lands described in the patent are non-mineral.

Now, the paragraph last above quoted contains a direct statement by the Court, that in the absence of an *opportunity* to have the land sufficiently explored to determine its character, an exception of mineral lands should be included in the patent. Had not the Court already stated in its opinion in this very case, and cited its previous opinions to show that, in every case where the statute, under which a patent is issued, either expressly or by implication authorizes the Land Department to determine whether the lands are mineral or non-mineral, the issuance of the patent is a determination that the lands are of the character authorized by the statute to be patented? Will anyone assert that the Court was ignorant of this principle, when it stated in its opinion, in the Barden case, that the mineral exception clause *should be inserted in the patent* in the absence of an adjudication that the land described therein was non-mineral, and in absence of a statement to that effect in the patent? If it is conceded, as it must be conceded, that the Court was not then ignorant of that principle, then it must also be conceded that the Court held in the Barden case, that the officers of the Land Department derived no authority from the granting Act to determine or adjudicate the character of mineral lands in a proceeding had wholly under it. There is no escape from this conclusion. To assert to the contrary would be to accuse the Court of writing in one of the most important opinions it ever rendered, six pages of pure *obiter dictum*,

about some imaginary case not before it on the record, and to say that both such *obiter*, and such inconsistency of it, escaped the notice of the Court in that case, which was decided by a divided Court. Surely, if the granting Act authorized the officers of the Land Department to determine the character of mineral lands, then, they would have no right to insert such exception clause in the patent issued under it. Surely the Court knew this when it wrote in its opinion the paragraph last above quoted. This shows conclusively that the Court held deliberately in that case that all mineral lands were excluded from the jurisdiction of the Land Department under the granting Act.

A careful examination of the opinion in the Barden case reveals that the Court held in it:

1st. That the phrase "all mineral lands" in the exclusion clause of the granting Act includes unknown mineral lands.

2nd. That the mineral character of mineral lands within the limits of the grant must be determined and adjudicated under and by authority of the mineral-land laws, within the operation of which they are included and which specify the procedure for determination of their character, and not by authority of the granting Act, from the operations of which all mineral lands are excluded.

3rd. That the mineral character of these mineral lands shall be determined and finally adjudicated in the first instance by the Land Department, whenever the question of their character arises in a proceedings under the mineral-land laws. And that the decision must

be stated in patents to the railroad if the lands are adjudged non-mineral.

4th. That until such determination and adjudication is had, under the mineral-land laws, patents issued under the granting Act should contain a clause excepting and excluding mineral lands.

Such construction of the opinion renders each part of it entirely consistent with every other part, and entirely consistent with the express provisions of the granting Act, from all of the operations of which "all mineral lands" are expressly excluded. The rulings in the opinion of the Barden case cannot be harmonized with the assertion that the granting Act authorizes the Land Department to adjudicate the character of mineral lands in a proceeding had wholly under it; nor can such assertion be harmonized with the express provision of the granting Act which excludes all mineral lands from its operations.

The railroad company has two stock objections which it urges against the above construction of the granting Act. They are briefly:

1. That such construction would deprive them of their lieu lands.

2. That such construction would necessitate the exception of all lands "reserved, sold, granted, etc.", in the patent which would leave the grant entirely unadministered.

As the Supreme Court has adopted these arguments in favor of the railroad company, although

they are without foundation, it is necessary to examine them briefly. It is claimed that the provisions of the Act for selection of other lands, in lieu of mineral lands, renders imperative the adjudication of the character of mineral lands, prior to the issuance of the patent, in order that the grantee's opportunity to exercise this right of lieu selection may not be lost by the appropriation, under other laws, of all land which the railroad company might otherwise select in lieu of mineral lands. This is urged as a reason for requiring the Land Department to adjudicate the character of mineral lands by the operations of this special granting Act, from the operations of which all mineral lands are expressly excluded by the Act, itself. Of course, the argument is not usually stated so clearly as it is stated here, but the limitations of the granting Act required the above statement of it for accuracy.

It is strange that such arguments should mislead any one. The circumstance that the opportunity of lieu selection will surely be lost to the grantee, if it does not ascertain *what lands are mineral*, and makes its selections in lieu thereof, as a condition of the grant created by valid limitations of the granting Act. It is, therefore, a valid limitation of the grant. Is that a reason for regarding it as an extension of the grant, or as a reason for extending the grant, against the positive provisions of the Act which expressly withholds authority from the Land Department to adjudicate the

character of mineral lands, in a proceedings had wholly under it, through which adjudication alone the grant can be so extended? This right of lieu selection is only a *right*, the same as the right of any citizen to locate and claim land under an Act of Congress. This right of selection does not become a vested right until it attaches to the land by its lawful exercise. These railroad grantees, who have profited so enormously by the Government's beneficence, are the only citizens in the United States, who have ever claimed to be injured because the Government does not point out to them what lands they may and what lands they may not select. They have the same right as other citizens to have the mineral character of mineral lands determined under the mineral-land laws. They have had more reason than other citizens to bestir themselves in this regard, for by locating the mineral lands within the limits of their grant, and acquiring title thereto under the mineral-land laws, they could establish their right to select other lands in lieu thereof under the granting Act. They do not seek equality before the law, but seek the special privilege of obtaining title to mineral lands by the operations of an Act of Congress, from the operations of which all mineral lands are excluded, in order that they may avoid the expense of developing the land as required by the mineral-land laws, and hold the lands under the granting Act, contrary to the policies of those laws. It is alleged and admitted in this case that the railroad com-

pany has known, since before the patent issued, that the lands here in controversy are mineral lands. It has no right to complain of loss of lieu selections.

The argument that the above construction of the granting Act, and the Barden case would necessitate an exception in the patent of all lands "reserved, sold, granted, etc.," and leave the grant unadministered, is also without foundation. The granting Act only excepts from the grant lands "reserved, sold, granted, etc." They are, therefore, within the operations of the granting Act, and the officers have authority, derived from the granting Act, to segregate those lands from the lands granted. This authority was given them for the reason, that under the provisions of the granting Act, the records of the Land Office would enable them to segregate such excepted lands accurately. All mineral lands were excluded from the operations of the Act, and thereby withheld from the authority of the officers of the Land Department to segregate them from the lands granted, under that Act, because nearly all the mineral lands were unknown, and Congress knew, therefore, that they could not be accurately segregated, before the patents must issue under the fourth section of the Act. They cannot be included because they were unknown. Congress excluded them for that very reason.

As the Supreme Court has cited and quoted from *Davis v. Webb*, 139 U. S. 507, in this case, to show that the Land Department must adjudicate the character of mineral lands by authority of the

granting Act, it becomes necessary to analyze that case carefully. It was between plaintiff claiming land under patent of a mining claim, dated January 16, 1880, and defendant claiming the same land by mesne conveyance under a townsite patent, dated September 26, 1870. The record did not show when the mineral location was effected, nor whether there was a mine on the land at the time the townsite patent issued. The townsite statute contained the provision:

“Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof,”

and contained another provision:

“No title shall be acquired” under its provision, “to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing law.”

It is apparent that the clauses above quoted exclude lands falling within the definitions of the terms “mine” and “valid mining claim” from the power of citizens who acquire them under the townsite law. In that case the Supreme Court adjudged that the terms “mine” and “valid mining claim” included only known mineral lands. The language of the opinion shows that the Court appreciated the fact that a mine is mineral land from which mineral in paying quantities is extracted, and that a valid mining claim is mineral land, which has been located

under the mineral-land laws. Therefore, the thing excluded from the power of acquisition in that case was *known* mineral land (pages 517, 526).

Now, what was the *effect of the exclusion* of such lands on the power of the officers, under the townsite law, to transfer the land excluded? The opinion in that case is susceptible of but one construction, viz.:

1. That as the townsite patent was issued prior to the mineral patent, the burden of proof was upon the mineral claimant to show that the land was *known* mineral land at the time the townsite patent was issued, in order to bring the land within the exclusion of mines and valid mining claims from the power to transfer land by authority of the statute (pages 525, 526).

2. That this might be shown by evidence that the land had been worked as a mine or located under the mineral-land laws as a mining claim, prior to the issuance of the townsite patent (pages 526, 528).

3. That if sufficient evidence of this kind had been produced to prove that the land was known mineral land, because it was within the definition of the term "mine" or "valid mining claim" when the townsite patent issued, then the townsite patent could convey no title, because such proof would reveal that the lands were excluded from the authority or jurisdiction, operation of the townsite law (page 526).

4. That in such case the later patent, issued under the mineral-land laws would convey the title (pages 526, 527).

5. That the defendant claiming under the townsite patent could submit evidence "to prove that at the time the patent to the Butte townsite was issued to the probate judge, the

premises embraced by the Gold Hill lode were not known to be valuable for minerals of any kind," and the reason for the right to prove this was: "the question was not whether there were valuable minerals at the time the (mineral) patent was issued, but whether such minerals were known to exist within the premises at the date of the townsite patent to the probate judge" (page 527).

It will be noticed that the lands which fell within the definition of those excluded from the authority to convey were removed from the jurisdiction of the Land Department under the statute which so excluded them, and that, therefore, it was relevant and material to prove that the lands were within those definitions *at the time the townsite patent issued*.

What becomes of the theory, under a statute which excludes the lands in controversy from its authority, that a patent issued, by its authority, is a conclusive determination that all lands included within its description are of the character authorized by that statute to be patented? If such is the law of such an Act of Congress and of the decisions in *Deffeback v. Hawke*, and *Davis v. Weibbold*, how then does it happen that the patent issued to the probate judge, September 26, 1877 (page 512) was not a conclusive determination that all the lands included therein were not *known* mineral lands when that patent issued? And how does it happen that the mineral claimant was permitted under the opinion of the Supreme Court in that case to show both

in the Interior Department and in the courts, that the lands included in the townsite patent were *known*, at the time it issued, to be mineral lands, and were not, therefore, conveyed by the townsite patent? Could he show this if the issuance of the townsite patent was such conclusive determination and adjudication? If the issuance of the mineral land patent was a conclusive determination, upon more mature consideration, that the lands were known to be mineral at the time the townsite patent issued, then, how does it happen that the defendant could show that they were not *known* mineral lands when the townsite patent issued? Does the Supreme Court hold in that case that the mineral patentee could attack the townsite patent collaterally? If so, why? Just how did the Court reconcile its holdings in *Davis v. Weibbold*, *supra*, with its earlier decisions in *Smelting Company v. Kemp*, *supra*, and *Steele v. Smelting Company*, *supra*, which are cited by the railroad company and by the Court in this case to show the conclusiveness of the railroad company's patent? The Court clears up the whole matter and answers all these questions in a single paragraph by saying:

“They (patents) are conclusive in such actions of all matters of fact, necessary to their issue, *where the department had jurisdiction to act upon such matters, and to determine them*; but if the lands patented were not at the time public property, having been previously disposed of, or *no provision had been made for their sale, or other disposition*, or they were reserved from sale, the department

had no *jurisdiction* to transfer the lands, and their attempted conveyance would be void no matter with what seeming regularity the forms of law have been observed."

Now, which one of these circumstances was it which removed the lands there in question from the power of the Land Department to convey them? It was the fact that the townsite statute made no provision for the sale or disposition of known mineral lands, but on the contrary forbade acquisition of title to such lands under the townsite law. All of the discussion of the Court in that case concerning known and unknown mineral lands was only to the point that the terms "mine" and "valid mining claim" were inclusive of only known mineral lands. The Court did not hold in that case that the townsite patent was good and conveyed the title, if the lands were known mineral lands at the time it issued. It held exactly the contrary, as the opinion shows, although it may appear otherwise from a single quotation from the opinion. The fact that mineral lands could be conveyed under the mineral-land laws was not held to authorize their conveyance under the townsite laws. The townsite patent was not conclusive that the lands were not known mineral lands when it issued.

The railroad company and the Supreme Court do not hold that known mineral lands were not excluded from the jurisdiction of the Land Department under the townsite law in that case, but they assert that only lands known to be mineral at the

time the patent issued under that statute were so excluded and affected; which is true, and from this, they assert that only lands known to be mineral, at the date of the patents issued under the granting Act here in question, are excepted from the grant, and they deny that they were thereby removed from the jurisdiction of the Land Department to convey them in a proceedings under that granting Act. But, the exclusion clause removes known and unknown mineral lands from that jurisdiction. And how and why can the description or definition or nature of the things excluded change the legal effect of the exclusion on the authority of the Land Department over them in a proceeding under the Act from the operations of which they are excluded? The Supreme Court adjudged in *Davis v. Weibbold*, supra, that such exclusion of *known* mineral lands deprived the Land Department of jurisdiction over them under the Act from the operations of which they were excluded, and that, therefore, those officers had no power to convey known mineral lands under that Act, whether the department knew they were known mineral lands or not. Would notice in the patent of this restriction in the statute be void? Would it limit or restrict the grant?

Now, the Supreme Court held in case of *Barden v. Northern Pacific*, supra, that all mineral lands were excluded from the operations of the granting Act, whether they were known or unknown to be mineral, and that the knowledge or lack of knowledge of the officers in respect to their mineral char-

acter was not intended by Congress to limit their exclusion or define the grant. Therefore, all mineral lands known and unknown are excluded from the jurisdiction of the officers of the Land Department in a proceedings under the granting Act. Are not those mineral lands, whether known or unknown, the same lands they were when Congress so excluded them? Has anyone changed the granting Act so as to include them? If so, who? Neither the nature nor the extent of the things excluded can affect in any way the legal effect of their exclusion.

II.

PUBLIC MINERAL LANDS KNOWN AND UNKNOWN ARE INCLUDED WITHIN THE OPERATIONS OF ACTS OF CONGRESS WHICH AUTHORIZE THE LAND DEPARTMENT TO GRANT ONLY NON-MINERAL LANDS BY PATENT AND CONTAIN NO SPECIAL PROVISIONS OTHERWISE LIMITING THE JURISDICTION OF THE LAND DEPARTMENT TO NON-MINERAL LANDS.

The general statutes, which authorize the Land Department to grant only non-mineral lands by patent, require that department to convey a full and unconditional title to all lands so granted. The creation of such grants necessitates a prior determination that the lands granted are non-mineral. It is, therefore, a duty of the department, created by such statutes, to adjudicate the character of lands applied for. In order to do this properly that department must have the lands examined by some-

one, ascertain the facts concerning them,—whether they contain mineral, if so, the nature, condition and extent of deposits—and from such facts determine whether the lands are or are not mineral lands. They refuse to grant them, or grant them upon the application, as the findings warrant. To refuse to grant the lands, because they are found to be mineral, is just as much the final official act of the proceedings on the application as is the issuance of a patent upon the findings that they are non-mineral. It would be just as reasonable to say that non-mineral lands are not within the operations of such statutes, because the officers cannot rightfully refuse a patent upon proper application and findings that they are non-mineral, as it would be to say that mineral lands are not within their operations because the officers cannot rightfully issue a patent for them upon the findings that they are mineral. To refuse to grant lands on an application and a finding that they are mineral is just as much an official declaration that they are mineral, as to grant them on an application and a finding that they are non-mineral is an official declaration that they are non-mineral. Therefore, in all proceedings under such Acts of Congress, mineral lands are just as much subject to the operations of those Acts as are non-mineral lands; under all the definitions of the term “operations” when used in respect to the authority of an Act of Congress, it includes every phase of power or authority derived from the Act, every duty imposed by it, every obligation it creates,

every right it bestows—even the right to apply for patent under an Act of Congress is an operation of that Act. The operations of an Act of Congress include all of the various phases of its authority and their practical workings and effects. For the same reasons, the public mineral-land laws include within their operations non-mineral lands.

Some Acts of Congress, which authorize grants by patents, contain special provisions intended to remove mineral lands from some particular authority, duty, obligation or right created by the Act, and so to affect some particular phase of the Land Department's jurisdiction over mineral lands. For instance, the townsite laws provide that "no title shall be acquired" to any "mine" or "valid mining claim". This provision was held in *Davis v. Weibbold*, *supra*, to deprive the Land Department of power to convey the lands included within the definitions of those terms. Whether it deprived the Land Department of jurisdiction to determine whether the land was within or without those definitions is questioned. This power to convey is an operation of the Act. The placer mining law provides that an applicant for patent under it shall be deemed not to have applied for a lode which was known to exist within the limits of his placer claim at the date of his application, unless he mentions such lode specially in his application. This provision excludes the lode so known from the *application* in which it is not specially mentioned, and so removes it from all jurisdiction of the Land Department in proceedings on the appli-

cation. The right to apply for the patent and the applications are operations of that Act. The Supreme Court has held that this provision requires an exception of known lodes in the patents (*infra*). The provision of the joint resolution of January 30, 1860, that "no Act, etc., shall be construed to include mineral lands" excludes mineral lands from the granting authority or operations of the Acts to which it refers, and so excludes them from those *grants*. It also excludes mineral lands from the authority of those Acts by which any Court or officer might decide that mineral lands passed by such grants, which authority is also an operation of the Acts to which the resolution refers. That resolution also provides that mineral lands are thereby "reserved exclusively to the United States" from the Acts of Congress to which the resolution refers. This provision removed mineral lands so reserved from all authority derivable from those Acts. As shown above, this joint resolution was intended to have and has exactly the same effect *as to the lands reserved by it* as the exclusion clause in this granting Act, in respect to the lands excluded by it from all the operations of the granting Act.

None of these special provisions, in Acts which authorize the department to grant lands by patent, are as broad and effective as this excluding clause in the granting Act which excludes all mineral lands, both known and unknown, from all of the operations of the granting Act. This special excluding

clause, in the granting Act, reaches every phase of the jurisdiction of the Land Department, in respect to all mineral lands, whether known or unknown, in every proceeding had wholly under that special granting Act. It excludes all mineral lands from every operation—authority—of that Act. It leaves the title of those lands in the Government unaffected, just as they would be if the Act had never been passed. They are, by the Act itself, forever removed and excluded from all and every power, authority, duty, obligation and right, express or implied, created by or derivable from that Act by anyone. To deny this is to contradict the express provision of the statute. A court, in holding to the contrary, violates this express excluding clause of the Act of Congress, and assumes to include all mineral lands within the operations of that Act from all of the operations of which Congress has expressly excluded them. It is not within the lawful power of courts to hold by implication that a statute provides as they think it ought to provide, in respect to the disposition of public lands, when the statute expressly provides otherwise. The equity jurisdiction of courts do not go to that extent in respect to a subject matter over which Congress has, under the Constitution, exclusive and plenary authority to legislate.

These observations are a complete answer to the statement of the Supreme Court's opinion (page 15, Advance Sheets), that in respect to the conclusiveness of patents: "no distinction is recog-

nized between patents issued under railroad-land grants and those issued under other laws; nor is there any reason for such distinction''. The distinction is that, in this railroad-land grant Act, there is a special provision, in addition to the exception of the mineral lands from the grant, not found in general statutes, which excludes all mineral lands from the operations of the Act, which created the grant and authorized the issuance of patent, and thereby removes all mineral lands, whether known or unknown, from the jurisdiction of the Land Department derived from that special statute. If the Court had recognized this distinction, its rulings in this case would have conformed to this provision of the granting Act, instead of contradicting it.

III.

THE MINERAL LAND EXCEPTION AND EXCLUSION CLAUSE CONTAINED IN THE PATENT DOES NOT EXCEPT AND EXCLUDE MINERAL LANDS FROM THE GRANT, BUT IS ONLY NOTICE FOR RECORD THAT THE GRANTING ACT, WHICH CREATED AND DEFINED THE GRANT, AND VESTED IN THE GRANTEE TITLE TO ALL LANDS GRANTED BY IT, EXCEPTS ALL MINERAL LANDS FROM THE GRANT AND IN ADDITION THERETO EXCLUDES THEM, WHETHER KNOWN OR UNKNOWN, FROM THE JURISDICTION OF THE LAND DEPARTMENT IN THE PROCEEDINGS WHEREIN THE PATENT WAS ISSUED.

The ruling of the Supreme Court in its opinion in the case at bar, that this exception and exclusion clause contained in the patent is void, is sought to be supported by the decisions in *Davis v. Weib-*

bold, *supra*; *Cowell v. Lammers*, 21 Fed. 200; *Deffebach v. Hawke*, *supra*; *Shaw v. Kellogg*, 170 U. S. 312, 337, 341, 343, supplemented by the departmental decision; *Samuel W. Spong*, 5 L. D. 193; *Courtwright v. Wisconsin Central Railroad Company*, 19 L. D. 410; *Re Northern Pacific Railroad Company*, 32 L. D. 342, and the decision in *Sullivan v. Iron Silver Mining Company*, 143 U. S. 441. In all of these decisions by the Supreme Court, except that in *Shaw v. Kellogg*, *supra*, the case arose concerning a patent which created a grant under authority of a general statute which authorized the Land Department to grant lands. In all of those cases, the statute required the Land Department to grant by patent an unrestricted and unconditional title to the lands applied for, or to grant no title at all. Necessarily, therefore, any attempted by that department to grant a restricted or conditional title, evidenced by a patent containing an excepting or restricting clause was a violation of the provisions of the Act of Congress by authority of which they created the grant by issuance of the patent. Hence, it was held in *Deffebach v. Hawke*, *supra*, and in *Davis v. Weibbold*, *supra*, that the Land Department had no authority or power under those Acts—the mineral-land laws—to insert such restrictive and conditional clauses in the patent. Their powers to create and define the grant were given and defined by the Act of Congress under which they were proceeding. Will anyone assert that the power of Congress to create and define such restrictive grants was

defined and limited in any such manner, when it created this grant by the granting Act? If not, then the conditional and restrictive grant, which it so created, is perfectly effective. That the title so defined was not known to the common law is of no importance, for Congress is a law-making body. The same lack of power in the Land Department to change or override the Acts of Congress under which they were proceeding, when they issued the patents in question in those cases, prevents them from changing this granting Act and the grant made thereby, and from including in the grant mineral lands, which Congress expressly excepted from the grant and excluded from the authority of the granting Act. The reason given by the Court in *Davis v. Webb*, *supra*, for holding the exception clause in the patent invalid was, that the officers could not override the Acts of Congress, and

“insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, *they could limit or enlarge their effect without warrant of law*. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged or diminished by any reservation of the officers of the Land Department, resting for their fitness only upon the judgment of those officers”.

Now, it is also true in respect to the grant created and defined by this special granting Act, that

nothing which those officers can do can change the grant made by that Act of Congress. Patents issued under it carry such rights to the land included in the odd sections not "reserved, sold, granted, etc.," as the law confers and no others, and those rights can neither be *enlarged* or diminished by any action of the officers. This grant never existed without its exception of mineral lands. The granting Act never existed without its exclusion of all mineral lands from its operations. It is no more within the power of the Land Department to enlarge the grant by eliminating these exceptions and exclusions, than it was in their power in those cases to restrict the title. The exclusion clause of the granting Act removes mineral lands from its jurisdiction. The same reasoning applies to the case of *Sullivan v. Iron Silver Mining Co.*, *supra*, where it was held that "the exception of the statute cannot be extended by those whose duties it is to supervise the issuance of the patent". Nor could they enlarge the grant made by patent under the placer law to include known lodes, by assuming to determine that no known lodes existed within the limits of the claim. Why? Because, known lodes not specially applied for were excluded by the statute from the application which was an operation of that law, which exclusion removed such lodes from their jurisdiction. No more could they eliminate the exception, made *in praesenti* in the granting Act of Congress which created this grant, especially when the granting Act excluded

from all of its operations and therefore from all of their jurisdiction the lands so excepted and excluded.

The case of *Shaw v. Kellogg*, *supra*, was one in which the grant was made *in praesenti* by an Act of Congress, which also directed the officers of the Land Department to supervise the location of the land, and to conduct the proceedings which vested the title. That Act simply granted "lands, not mineral", and contained no provision *excluding* mineral lands from the *operations* of the Act. Therefore, although mineral lands were *excepted* from the *grant*, they were *included within the operations* of that Act, just as much as non-mineral lands, although the duties of the officers in respect to mineral lands, under the authority of that statute, was very different than their duties in respect to non-mineral lands. That case is not, therefore, an authority for the proposition that mineral lands are included within the operations of an Act of Congress, from the operations of which "all mineral lands" are expressly excluded, by the Act, itself. In that case, mineral lands were within the jurisdiction conferred by the statute upon the officers; in this case all mineral lands, known or unknown, are excluded by the statute from the jurisdiction of the officers under it.

The Supreme Court has in its opinion in this case cited three departmental decisions as authority for the proposition, that the exception and exclu-

sion clause contained in the patent, is void and of no effect, for want of authority of law to insert it. Before examining these alleged authorities, it will be advantageous to note some facts, evidenced by the books containing the decisions. Counsel has secured 19 L. D., the book in which *Courtwright v. Wisconsin Central*, *supra*, is reported, and also 32 L. D., in which the case *Re Northern Pacific Railroad Company* is reported. The logic of the decisions contained in these books led counsel to ascertain as best he could from the books, just how authoritative these decisions are, before assuming to criticise them. On page III the following statement is found:

“OFFICE OF THE ASSISTANT ATTORNEY-GENERAL.

The decisions of the Secretary of the Interior, relating to public lands, are prepared in the office of the Assistant Attorney-General for the Interior Department, under the supervision of that officer, and submitted to the Secretary for his adoption.”

19 L. D. contains decisions from July, 1894, to December, 1894. It has an index of 240 cases reported in it, and an index of 102 cases overruled and modified. “(From Vol. 1 to 19, inclusive.)” 32 L. D. has an index of 254 cases reported, and an index of 258 cases overruled and modified. “(From Vol. 1 to 32, inclusive.)” This volume includes decisions from January, 1903, to May, 1904. It is evident from these facts printed in these books, that at the time these decisions were rendered and the opinions written, the legal talent

of that department was pretty bad, but was rapidly becoming better or worse, and at the rate at which they are progressing in this regard, it is only a question of time when they will have all of their important decisions overruled or modified, and courts who adopt these land decisions as authorities will soon be in serious difficulties.

In *Courtwright v. Wisconsin Central*, *supra*, to put the matter tersely, it is held that the Interior Department lost jurisdiction over mineral lands by the operations of an Act of Congress, from the operations of which, those lands were excluded. In other words, that they had lost jurisdiction of the lands applied for by the issuance of a patent in a prior proceedings, wherein they had no jurisdiction over those lands, and notice of such lack of jurisdiction is given in the patent which they had issued. This decision is claimed to be based on the authority of the decision of the Supreme Court in *Barden v. Northern Pacific*. But the writer of the opinion, conveniently stops quoting from the opinion in the *Barden* case when he reaches the paragraph in which the Court stated that the exception and exclusion clause should be inserted in the patent in the absence of an express finding under the mineral-land laws that the land was non-mineral.

It appears in the decision, *Northern Pacific Railroad Company*, 32 L. D. 342, that the proceedings in which that decision was rendered, were entirely

ex parte, in other words, the Northern Pacific Railroad Company wrote a letter to the Land Department requesting that the exception clauses be left out of the patents issued under its grant, and the legal staff, who prepare these opinions, on December 10, 1903, decided that there was no authority for the insertion of this clause in the patents "and directions are given that in *all* future railroad land-grant patents, the excepting clause be excluded". Nobody interested in these matters outside of the railroad company was given an opportunity to be heard. To show how this thing was accomplished, a few extracts from the opinion are quoted:

"All mineral lands, other than coal and iron, are *excluded* from the Northern Pacific land *grant*, whether known or unknown at the time of the attachment of rights thereunder, either by definite location or selection. *Barden v. Northern Pacific Railroad Company*, 154 U. S. 288".

Who, then, has changed the statute?

This passage conveniently overlooks the facts that all mineral lands, whether known or unknown, are excluded from the *operations* of the Act, which created the grant, and that they are therefore excluded from the grant, in addition to being excepted therefrom; and that such exclusion removed all mineral lands, whether known or unknown, from the jurisdiction of the Land Department in a proceeding had wholly under the granting Act. The next heading of the opinion is:

“Who shall determine the character of the land within the limits of a railroad grant?”

To show that the character of mineral lands should be determined by the Land Department, in a proceeding under the granting Act, from the operations of which all mineral lands are excluded, the writer of the opinion cites and quotes from *Litchfield v. Register and Receiver*, 9 Wall. 575, 577; *Steele v. Smelting Company*, 106 U. S. 447, 450, 455; *Burffening v. Chicago, St. Paul, etc.*, 163 U. S. 321, 323; *Northern Pacific Railway Company v. Sanders*, 166 U. S. 620, 635; *Barden v. Northern Pacific*, *supra*, 328, 329; *McCormick v. Hayes*, 159 U. S. 332; *Davis v. Weibbold*, *supra*, and *Deffeback v. Hawke*, *supra*.

Litchfield v. Register and Receiver, *supra*, was a case in which a mandate was sought to control the actions of the Register and Receiver. The Court held that official action could not be controlled in that manner, because it involved the exercise of judgment and discretion in determining whether lands applied for, were subject to disposition or sale upon the application.

Steele v. Smelting Company, *supra*, was a case arising in respect to a patent issued under the mineral-land laws. The author of the opinion in *Re Northern Pacific* evidently believed that he could transplant the authority of the mineral-land laws into the special granting Act, and exercise it in a proceedings under that special Act, and so gain

authority to convey mineral lands, which are excluded from the jurisdiction of the Land Department in such proceedings by an express provision of that special granting Act.

Burffening v. Chicago, St. Paul, etc., *supra*, arose in respect to a patent on soldiers' additional entry to islands in the Mississippi River, which were within the territorial limits of the incorporated City of Minneapolis at the date of the entry. The Act of Congress, under which the entry was made and the patent issued, contained a provision that lands within the limits of an incorporated city or town "shall not be subject to the rights of pre-emption" and homestead. The Court held in that case that such provision of the statute, excluded the lands in question from the *right of entry* under it, which is an operation of that Act, and that, therefore, both the entry and the patent were void and subject to collateral attack in the court of law. The portion of the opinion quoted in this land decision case to the effect that a patent is conclusive, is taken from that portion of the opinion in which the Court denied in Burffening v. Chicago, St. Paul, etc., *supra*, that the patent in that case was conclusive. Immediately after the part there quoted, the Court says:

"But it is also equally true that when by Acts of Congress, a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent,

transfers no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or *convey any public lands in disregard or defiance thereof*. Smelting Company vs. Kemp, 104 U. S. 636, 646; Wright vs. Roseberry, 121 U. S. 488, 519; Doolan vs. Carr, 125 U. S. 618; Davis vs. Admr. vs. Weibbold, 139 U. S. 705, 729; Knight vs. Land Association, 142 U. S. 161”.

It will be noticed that in that case, the Court held that the lands which were excluded from the jurisdiction of the Land Department in the proceedings, wherein the patent was issued, could not be conveyed by the department, and that it was not the nature, extent or definition of the thing excluded, but it was the *exclusion* which deprived the department of jurisdiction. What is excluded must in each case be determined from the provisions of the statute. But the *effect of the exclusion* is always the same.

The author of this land decision case then quotes from Northern Pacific Railroad Company v. Sanders, *supra*, as follows:

“Whether the lands sought to be purchased *as mineral lands* were of that character was a matter for the determination, in the first instance, of the Land Department; and there was jurisdiction in that department to pass upon every question arising upon applications *to purchase them as mineral lands*.”

That was a case in which lands claimed by the Northern Pacific under its grant had been located

as mineral lands. The Court held that their mineral character should be determined under the mineral-land laws. Is that any reason for holding that their mineral character could be adjudicated on an application under the granting Act, which excluded those lands from the operations of that Act?

This land decision then quotes from *Barden v. Northern Pacific*, *supra*, as follows:

“If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption, or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting *lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals* in such quantities as to justify the issue of patent.”

The very passage thus quoted shows that the Court was saying that the character of mineral lands must be determined by authority of the mineral-land laws, because it had already held in its opinion in that case that they were excluded from all authority derivable from the granting Act. The writer of this land decision case, after the above quotations: “These cases clearly establish the jurisdiction of the Land Department in the premises”. But he does not state what the premises are. The decision is correct if the author means to say that the character of the mineral

lands within the limits of the grant must be determined by authority of the mineral-land laws, but the cases which he cites are not authority for the proposition that the Land Department can determine the character of mineral lands by the operations of the granting Act, from all of the operations of which all mineral lands are excluded by the Act itself. The author then quotes further from *Barden v. Northern Pacific*, *supra*, to show that the Land Department must determine the character of mineral lands within the limits of the grant, but fails to notice that the authority to determine their character is derived, according to the rulings in that case, from the mineral-land laws, and not from the granting Act, in a contest. He, also, conveniently stops quoting from that opinion when he reaches the point where the Court says, that, in the absence of a determination by authority of the mineral-land laws, that the land is non-mineral, the exception clause must be inserted in the patent. If he had quoted that paragraph also and then reflected that, according to the decisions he had already quoted, such exception clause could not be lawfully inserted in the patent, if the Land Department had jurisdiction, in the proceedings wherein the patent was issued, to determine the character of mineral lands, it would have been apparent to him that the presence of that paragraph in the opinion shows very clearly that the Court was holding that the granting Act furnished no authority to determine the character

of mineral lands, because all mineral lands are expressly excluded from the operations of that Act.

The writer of the land decision case then quotes from *Davis v. Weibbold*, *supra*, which we have already examined.

The author of this decision, *Re Northern Pacific Railroad Company*, does not quote a single case nor cite one which supports in the slightest degree his ruling that there is no authority for the insertion of the mineral exception and exclusion clause in the patent issued under that railroad-land grant Act, from the operations of which all mineral lands are expressly excluded. He simply clips out a few sentences from one opinion, then from another, and patches them together so they read well, if one does not examine the opinions from which he quotes. These officers seem to have no idea from what Acts of Congress their authority is derived in any particular proceeding. They seem to think they can exercise any authority derived from any Act of Congress in a proceeding under any other Act.

The opinion of the Court in this case, at page 17, quotes from a report from the Commissioner of the General Land Office for 1868. The quotation states that the affidavit of the railroad company is required to the effect that the lands "are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant". That and the lists are then examined and compared with the

plats and records of the Land Office, supposedly to determine whether the lists are free from conflicts shown on the records and plats. A record of a mining claim never appears on the records of the Land Office until entry—application for patent. Were these offices supposed to patent to the railroad company mining claims for which no patent had been applied for? Then to more effectually guard the matter, the mineral exception clause is included in the patent. The report then continues to state facts which show absolutely the impracticability of determining the character of mineral lands from those records and plats. If that report reveals anything, it reveals the very circumstances, in the administration of the grant, which induced Congress to exclude mineral lands from the operations of the granting Act. The affidavits, which the railroad company in fact filed, simply stated conclusions and no facts. Those affidavits state that the lands are not “interdicted mineral nor reserved lands”. There is no comma after the word “interdicted” in the affidavits. The Court calls attention to the fact that contests are allowed, in which citizens might prove the land mineral, and that the exception and exclusion clause was inserted “with an eye to future discoveries rather than to existing conditions,” and that the practice in the Land Office shows that the exception clause was not intended to take the place of an inquiry of the character of the land, or to dispense with determination of its character, and that its presence in the patent does not signify that no inquiry or determination

was had. All these speculations are in the face of the express provision of the granting Act, which deprived the Land Department of jurisdiction to adjudicate the character of these mineral lands in a proceeding under that Act.

The Court quotes and cites from the case of Samuel W. Spong, 5 L. D. 193, where it is held that the issuance of a patent under the granting Act was a determination that the lands were non-mineral. It does not appear in the report of that decision whether the patent in that case was issued upon a finding that the land was non-mineral under the mineral-land laws or not. If it was not, the decision contradicts the decision in the Barden case and contradicts the Act of Congress.

The placer mining law provides in effect that an applicant for patent to a placer mining claim shall be conclusively deemed not to have applied for lodes *known to exist* within the limits of his claim, at the date of his application, unless he makes special mention of them in his application. The Supreme Court has held that the Land Department is not only authorized, but is in duty bound, to insert this exception of known lodes in the patent.

Reynolds v. Iron Silver Mining Company,
116 U. S. 687, 697-698;

Iron Silver Mining Company v. Mike Starr,
143 U. S. 394;

Noyes v. Mantell, 127 U. S. 348, 353-354.

The reason for the insertion of the exception clause in these patents is that, by excluding such known lodes from the application, the Act of Congress deprives the Land Department of jurisdiction or power to transfer such known lodes, not specially applied for. If the Act of Congress had excluded in like manner "known and unknown lodes," whether applied for or not, the exception and exclusion of them in the patent would have been equally authorized. In those cases, the grant was created by patent. The Court holds that the exception clause in the *statute* created an exception of known lodes from the grant, and that such exception in the *patent* simply expresses the intent of Congress evidenced by the statute. For greater reason, the Land Department is authorized to insert the mineral land exception and exclusion clause in a patent issued under this granting Act by which Congress, itself, created the grant *in praesenti*, together with the exception of mineral lands from the grant and the exclusion of all mineral lands from the jurisdiction of the officers of the Land Department, in a proceeding under it. Especially is this true, since the granting Act vests the title in the grantees to all lands granted by it. It is not the function of the patent to define the nature and extent of the grant, nor to change in any respect the limitations thereof fixed by the statute. The fourth section of the granting Act specifies particularly *all that shall be done* before the patent issues, viz., 1. Twenty-five consecutive miles of road shall

be completed ready for operation; 2. The president shall appoint three commissioners to examine the same; 3. They shall examine the road and if it has been completed as required by the Act, they shall report the fact under oath to the proper officer, “and *patents* of lands, *as aforesaid*, shall be issued to said company, *confirming* to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road”, and when other twenty-five mile sections are completed, examined and accepted as above, “then patents shall be issued to said company *conveying* the additional sections of land, *as aforesaid*, and so on, as fast as every twenty-five miles of said road is completed, as aforesaid”. It is difficult, indeed, to perceive how Congress could have stated more clearly that the patent should conform to the grant made by the statute, in respect to the exception and exclusion of mineral lands, over which the Land Department has no jurisdiction under this Act. But the Supreme Court avoided seeing it by ignoring that the patents must be “*as aforesaid*” and saying:

“And so it was that provision was made for issuing patents ‘confirming to said company the right and title to said lands’ after construction” (Opinion, page 10).

This microscopic view of the statute excludes its provision that the patents shall be “*as aforesaid*”. Also, in quoting the fourth section of the statute on page 8 of the opinion, in the next to the last line,

the word "as" is omitted before the word "aforesaid". (Supreme Court, Advance Sheets, Opinion, page 8.) The omission makes the word "aforesaid" modify "sections", whereas in the statute the phrase "as aforesaid" modifies the participle "conveying". Therefore, by ignoring the first phrase "as aforesaid" by narrowing a quotation from the statute, and misquoting the second provision for patent by leaving out the word "as", the opinion of the Court misconstrues this Act of Congress.

The Act of Congress provides that the patent shall conform to the provisions of the statute, and that it shall convey the "sections of land" as the statute grants them, and mineral lands are excepted from the grant and excluded from the power of the officers to convey or adjudicate or to determine their character in a proceeding wholly under the granting Act. But the Court says that the Land Department must determine what lands are mineral lands and what lands are non-mineral in a proceedings under this statute, from the operations of which mineral lands are excluded, and then disregards those provisions of the statute which forbid the issue of a patent to conform to such construction. This was all done in the face of the fact that for fifty years the Supreme Court had consistently held that the principal office of the railroad-land grant patent is to furnish record evidence, that the grant has been earned by construction of the road and is not subject to forfeiture for breach of the

condition of the grant requiring its construction; and that the lands described in the patent are odd-numbered sections within the exterior boundaries of the grant and are situated opposite to and coterminous with the completed section of the railroad that has been accepted and approved.

Wisconsin R. R. Co. v. Price Co., 133 U. S. 496, 510;

St. Paul, etc. v. Northern Pacific, 139 U. S. 1, 6;

Deseret Salt Co. v. Tarpey, 142 U. S. 241, 251;

Barden v. Northern Pacific, 154 U. S. 288, 324;

Wright v. Roseberry, 121 U. S. 488, 499;

Langdean v. Hanes, 21 Wall. 521.

Lands “reserved, sold, granted, etc.,” are only excepted from the grant, and the officers, therefore, have power to segregate them, but they have no power derived from the granting Act to segregate the mineral lands which are excluded from their jurisdiction under this Act, by an express provision thereof. The patents to be issued are to *confirm* the “right and title” created by the statute. They were not to change the “right and title”.

In speaking of the decisions in *St. Paul and Pacific Railroad Company v. Northern Pacific Company*, *supra*, and *Deseret Salt Company v. Tarpey*, *supra*, in the *Barden* case at page 315, the Court said:

“In both of those cases, the writer of this opinion had the honor to write the opinions of this Court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect with certain designated exceptions, as of the date of the grant, they never decided anything else. And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached.”

Such is the “right and title” to be *confirmed* by the patents and not changed. The fourth section of the Act, in providing for a patent “as aforesaid”, conveying “as aforesaid” specifies a patent which would confirm the right and title created by the statute. The joint resolution of June 28, 1870, is to the same effect. Under it the Land Department could *save* “the rights of actual settlers”, and the lands “granted, sold, reserved, etc.”, by segregating them, by the records of the Land Office, because the lands affected by these exceptions are not excluded from the operations of the granting Act. They are only excepted from the grant. But, under that resolution, the officers were obliged to *reserve* the mineral lands in the patent, because under the granting Act, they had no power or jurisdiction over any mineral lands, whether known or unknown, because they are excluded by the granting Act from its operations or authority, in addition to being excepted by it from the grant created and

defined by that Act. The mineral-lands exception and exclusion clause, in the patent, is only notice of the exception and exclusion of mineral lands in the statute, and that the Land Department had no jurisdiction over those lands *in the proceedings wherein such patent issued*. How can such notice of a statutory limitation of a grant, which the officers who issued the patent *had no power to alter or eliminate*, be void? A ruling that it is void upsets, completely, the repeated rulings of the Supreme Court in all its decisions in cases arising under the placer laws, in respect to the exclusion of known lodes, and absolutely ignores the fundamental principle upon which those cases are decided. The Land Department was not required, under those Acts, to determine whether *known lodes* existed within the claims or not, before issuing the patent, although in all of those cases, the grant was created by the *patent*, which, it is claimed, should grant or not. The thing there excluded was a *known thing*, and no prior claim was necessary to its exclusion. What is the basic reason for that ruling? Simply this: Known lodes were excluded by the statute from the application in which they were not specially applied for. Therefore, they were not within the jurisdiction of the Land Department in a proceeding on the application under the statute; and, therefore, the Land Department had no power to determine whether they existed within the claim or not.

Now, in the case at bar, there is far greater reason, of exactly the same nature, for the insertion of the exception clause in the patent.

In this case "all mineral lands" known and unknown are expressly and directly excluded from all authority derivable from the granting Act, which created and defined the grant, *with its exception and exclusion* and vested the title. Why then is the Land Department obliged, under this granting Act, to determine and adjudicate the existence or non-existence of both known and unknown mineral lands, which are excluded from their jurisdiction, but included in the odd *sections* for which patent is required to be issued, while under the placer law they are not required to do so even in respect to *known* lodes excluded from their jurisdiction? Is it because in those cases, they created the grant by patent and were bound to create and define it in accordance with the provisions of the statute, and *not enlarge* it by erroneously adjudicating as to the existence or non-existence of a *known* lode excluded from their jurisdiction, while in this case they *can enlarge* a grant already created and defined and of which the title had already vested by a special Act of Congress, by erroneously adjudicating as to the existence or non-existence of both known and unknown mineral lands excluded from their jurisdiction?

The Land Department can not gain jurisdiction of known or unknown mineral lands which are

excluded, by a special Act of Congress, from their jurisdiction derived from that special Act, by erroneously adjudicating, in the exercise of that adjudication, that such lands are not mineral, because they are not known to be mineral.

These principles are thoroughly established by those decisions under the placer law. It is of no importance what particular language is used in removing a thing from the jurisdiction of that department or what the thing removed is. Neither of these considerations affect, in any manner or in any degree, the legal effect of such exclusion. When it is clear—and it is clear in this case—*what* is excluded from their jurisdiction, and that *it is* so excluded, the effect of the exclusion is always the same, viz.: that the officers of that department can do absolutely nothing, in the exercise of such jurisdiction, in respect to the things so excluded.

This is why the Supreme Court held, pointedly, in the Barden case, that the *exception* of mineral lands from the grant *could not be limited by inference* from any language of the granting Act “*in the face of its declaration that all mineral lands are thereby ‘excluded from its operations’*” (Opinion, pages 313-314).

For the same reason that Court distinguished Deffeback v. Hawke, *supra*, and Davis v. Weibbold, *supra*, in the Barden case, as cases in which only *known* mineral lands were excluded from the *jurisdiction* of the Land Department by the town-

site Act, while in the Barden case both known and *unknown* mineral lands were excluded from their jurisdiction. For the same reason the Court stated in the Barden case that “the *effect* given to the townsite patent” in Davis v. Weibbold, was not inconsistent with the views expressed in the Barden opinion; and in that case the Court held that the mineral claimant could defeat the townsite patent, previously issued, by proving that the land was *known* to be mineral before the townsite patent issued (323-324).

For the same reason the Court held in the Barden case that the character of the mineral lands must be determined by authority of the mineral-land laws, and not by authority of the granting Act.

For the same reason the Court held, in the Barden case, that the patents *issued* under the granting Act must state that the lands were non-mineral, or they would not comply with that Act, as the adjudication of their character must be under other laws, and such decision could not therefore be presumed from the issuance of a patent *under the granting Act*, which furnished no authority for adjudication of the character of mineral lands.

And for the same reason in the Barden case, the railroad company argued: that the Secretary of the Interior had no power under the granting Act to adjudicate the character of mineral lands, and that, therefore, the patent which was due,

under the granting Act, to be issued before the land was known to be mineral, should include lands which were admitted to be mineral and were admitted not to have been known to be mineral at the time an absolute right to the patent provided for accrued.

And for the same reason, the Court replied to this argument by pointing out that the granting Act "*excludes mineral lands* in the direction for such patent to issue", because it provides for patents "as aforesaid", "confirming" the right and title granted, and for patents "conveying" the sections "as aforesaid"; and it is *aforesaid, in the Act*, that "mineral lands" are *excepted* from the grant and that "all mineral lands" are *excluded in praesenti* from the *operations* of that Act. And for this reason the Court had already held that such *exception* could not be limited by inference *in the face* of such *exclusion*. And, for this reason the Court held that, while the granting Act furnished no authority to adjudicate the character of mineral lands, yet, *under the law* the duty of determining the character of mineral lands *under the legislation of Congress*, reposes in the officers of the Land Department. And the Court cited and quoted from cases arising under the mineral-land laws to show that the character of mineral lands included within the odd sections can be fully determined by exploration, under those laws, and their character finally adjudicated thereunder.

And for all of these reasons the Court held in the Barden case that if the patent issues before opportunity is afforded for such exploration, determination and adjudication, the patent must contain notice that no mineral lands passed thereby.

Now, that same Court says that, all these reasons, which it then saw in the granting Act, and deliberately wrote into its opinion, which has warranted the insertion of the mineral exception and exclusion clause in these patents, are no longer found in that Act, and therefore these railroad companies have acquired title to a billion dollars worth of public mineral lands contrary to the express will of Congress declared in the very Act by authority of which that title is alleged to have been acquired. Who has changed that Act of Congress?

If lands of a designated character are expressly excluded from the *jurisdiction* of the Land Department by the Act of Congress under which a patent issues, such patent should always contain notice that no lands of that character are conveyed by the patent even though they are included in the descriptive part thereof, because the patent *can not* convey them. Such notice does not restrict the title. It is restricted by the Act of Congress, which is a law, and can not be altered or changed by executive officers or Courts.

IV.

THE PATENT IMPORTS ABSOLUTE VERITY OF THE ACT ISSUING IT, AND CONSTITUTES CONCLUSIVE PROOF THAT NO MINERAL LANDS, KNOWN OR UNKNOWN, HAVE BEEN GRANTED OR CONVEYED BY IT TO THE GRANTEE NAMED THEREIN. THEREFORE, APPELLANTS ARE NOT ATTACKING THE PATENT, BUT ARE INSISTING UPON ITS TRUTHFULNESS AND VALIDITY, AND ARE IN PRIVITY WITH THE GOVERNMENT BY VIRTUE OF THEIR LOCATIONS.

“As seen by the terms of the third section of the Act, the grant is one *in praesenti*; that is, it purports to pass a present title to the land designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. * * *

“This is the construction given to similar grants by this Court, where the question has often been considered; indeed, it is so well settled as to be no longer open to discussion.”

St. Paul & Pacific Railroad v. Northern Pacific Railroad, 139 U. S. 1, 5, citing
 Schulenberg v. Harriman, 21 Wall. 44, 60;
 Leavenworth, Lawrence, etc., Railroad Company v. United States, 92 U. S. 733;
 Missouri, Kansas, etc., Railroad Company v. Kansas Pacific Railroad Company, 97 U. S. 491;

Railroad Company v. Baldwin, 103 U. S. 426.

To the same effect, and also that the function of the patent is to provide evidence for record

that the road has been constructed in compliance with the provisions of the Act and accepted, and that the lands described in the patent are the lands coterminous with the road constructed and to which the title created by the statute attached, with the exceptions specified in the statute, see also *Deseret Salt Co. v. Tarpey*, *supra*, 247, and cases there cited; and to the point that the exception and exclusion of mineral lands is a condition and restriction of that title, itself, see *Barden v. Northern Pacific*, *supra*, 315-316, and the same case to the point that the mineral-land exception and exclusion clause may be inserted in the patent because all mineral lands are excluded from the jurisdiction of the Land Department derived from the granting Act (page 331).

It is admitted by the appellees and held by the Court that the Land Department has no power to disregard the provisions of the Act of Congress, and to enlarge a grant made thereby, so that it will include mineral lands which were excepted from it. Especially is this true when the granting Act, itself, removed from their jurisdiction all mineral lands in a proceedings had wholly under that Act.

The mineral-land exception and exclusion clause in the patent is, therefore, only notice for record that the grant includes no mineral lands, known or unknown, and that, therefore, none are conveyed

by the patent. This being true, it must be conceded that the lands were mineral lands "belonging to the United States" at the time of the location of them as alleged and admitted in this case. As the patent could have no effect whatever, and does not purport to have any effect on the Government's title, it is difficult to perceive why the fact that it issued before the mineral locations were made, could have any effect on the validity of those locations. Nor, is it apparent how appellants are *attacking the patent*, when they are not contradicting a single sentence contained in it, but are insisting that it is in all respects valid, and that it is a truthful record of the act of issuing it, and that that act was strictly in compliance with the requirements of the Act of Congress by authority of which it was issued.

The fact is that all during the course of this litigation, the appellees have been attacking the patent, and claiming not only that the patent is not a record of the act of issuing it, but also that the department determined and adjudicated that all the lands described in the patent were non-mineral, while the patent bears unmistakable evidence on its face that no such determination or adjudication was made, and the statute forbids such adjudication in the proceedings wherein the patent issued, by excluding all mineral lands from the jurisdiction of the Land Department under that Act.

V.

THE OPINION OF THE SUPREME COURT, AS CONTAINED IN ITS ADVANCE SHEETS, SHOWS CONCLUSIVELY THAT THE COURT'S FAILURE CORRECTLY TO INTERPRET AND APPLY THE EXCLUSION CLAUSE WAS DUE TO INADVERTENCE.

The Court says:

“As has been seen, the exclusion was of ‘all mineral lands’. It was not a mere reservation of mineral, but an exclusion of mineral lands, coupled with a provision that the company *should receive* other lands, not mineral, in lieu of them. This shows that a determination of the character of the lands, as mineral or non-mineral, was plainly contemplated. Besides, there was an *exclusion* of all sections and parts of sections ‘granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of’ when the line of the road should be definitely located, and this was followed by a similar provision for lieu lands. The *two exclusions* and indemnity provisions made it practically imperative that there be an authoritative identification of the lands passing under the grant and of those excluded, for otherwise great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable. Appreciative of this, Congress confided the identification of the lands, both included and excluded to the Land Department, of which the Secretary of the Interior is the supervising officer. We say their identification was confided to that department, because the granting Act expressly provided for the issue of patents ‘confirming to said company the right and title to said lands’, obviously meaning the lands granted but not the excluded lands, and also directed that the indemnity lands be selected ‘under the direction of the Secretary of the Interior’,

and because that department was already expressly charged with the administration and execution of all public land laws as to which it was not specially provided otherwise. Rev. Stat., Secs. 441, 453, 2478.” (Citing Catholic Bishop of Nesqually vs. Gibbon, 158 U. S. 155, 166, 167.) (*Italics mine.*) (Opinion, pages 9-10.)

The statute provides that, after the road is completed in compliance with the provisions of the Act, and has been examined by the commissioners, reported as constructed in compliance with the Act, and has been accepted:

“*patents* of lands, as *aforesaid*, shall be issued to said company, *confirming* to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road.” (*Italics mine.*)

And that when other twenty-five mile sections should be constructed, completed, ready for operation, reported by the commissioners, and accepted:

“then patents shall be issued to said company *conveying* the additional *sections* of land, as *aforesaid*, and so on as fast as every twenty-five miles of said road is completed as *aforesaid*”. (*Italics mine.*)

Now, in regard to the above quotation from the opinion of the Court: the statute does not provide “that the company *should receive* other lands” in lieu of mineral lands. It provides that they *may select* other lands in lieu of them. There was not “an *exclusion* of all sections and parts of sections ‘granted, sold, reserved, etc.’” There were not

“*two exclusions*”. Only mineral lands were *excluded* from the *operations* of the *Act*, in addition to their *exception* from the *grant*; while lands “granted, sold, reserved, etc.”, were only *excepted* from the *grant*, and were not *excluded* from the *operations* of the *Act*. And the two provisions for lieu selections are not similar. The statute provides that, in lieu of lands “granted, sold, reserved, etc.,” “other lands *shall be* selected”; while it provides that, in lieu of “all mineral lands”, other lands “*may be* selected” subject to certain limitations.

As has already been stated, in quoting the fourth section of the *Act* the Court left out the word “as” in the next to the last line (opinion page 8) and in connection with it on page 10 of the opinion omitted from its quotation from the statute the phrase “as aforesaid” which was descriptive of the patent to be issued, and required it to conform to the granting provisions of the *Act*. Then by leaving out the word “as”, as above stated, the Court makes the statute say that the patents shall be issued “conveying the additional *sections* of land *aforesaid*”, while the statute provides that patents shall be issued “*conveying* the additional sections of land, *as aforesaid*”. By these means the Court construes the granting *Act* to provide that the patent shall *confirm* an absolute title to all lands described in it. But such construction is positively prohibited by the express terms of the *Act*, itself, not only for the reasons above stated and by the holding of that

Court in the Barden case that mineral lands are excluded in these directions for the patent to issue, but also for another reason. In the first provision for the patent to issue, the statute states that the patent shall "*confirm* the right and title" granted by the Act, and in the second provision the word "conveying" is used to designate the function of the patent, because Congress intended to qualify this function of the patent by requiring its conveyance to conform to the granting provisions of the third section of the Act. This is done by addition of the phrase "as aforesaid" to qualify the participle "conveying" instead of using the word "confirming", which, if qualified by the phrase "as aforesaid", would refer back to the other provision for the issuance of patent, instead of to the provisions of the third section of the Act which created and defined the grant.

The Court's view is certainly a distorted view of the granting Act. Congress clearly provided that the patents should except and exclude, as does the granting Act, all mineral lands which were excluded from the operations of the Act and thereby removed from the jurisdiction of the Land Department in a proceeding had wholly thereunder. Thus, it is evident that the questions heretofore certified by the Court have not been answered according to the Act of Congress which created and defined the grant and vested the title in the grantee of all lands granted by it, but that they have been answered according to the provisions of an Act of

Congress which never existed, and which, if it did exist, would contradict the provisions of this granting Act if applied to this grant and the administration thereof.

One thing is certain, that the record of the Supreme Court in these matters, evidence by the Advanced Sheets of that Court, which are required by its rules to be printed, and are therefore a part of its records, and by its mandate are made a part of the records of this Court, is conclusive evidence that the Court inadvertently erred in answering the questions heretofore certified.

If all mineral lands, known and unknown, are not excluded from the operations of this granting Act, and thereby removed from the jurisdiction of the Land Department to include them, by inference or otherwise, within the grant, then, for reasons appearing in records and discussion of which is not permitted here, even the United States is forever barred from recovering any of the valuable petroleum lands to recover which it is now suing or intending to sue the Southern Pacific Railroad Company and its grantees.

The Supreme Court held in *Reynolds v. Iron Silver Mining Co.*, *supra*, that the exclusion of known lodes from the jurisdiction of the Land Department, under the placer law, was intended to prevent people from defrauding the Government in securing known lodes at two dollars and fifty cents (\$2.50) per acre, while the Government price

was five dollars (\$5.00) per acre, and also to prevent one person from acquiring an undue portion of mineral deposits. The same ruling is found in *Iron Silver Mining Co. v. Mike Sarr*, *supra*, and this is given as a reason for enforcing that exclusion rigidly. If this granting Act is enforced according to its terms and import, it will render fraudulent acquisition of title to mineral lands by the grantee absolutely impossible, and an attempt so to acquire them extremely unprofitable. Yet the records of the Federal Courts of this State reveal that this grantee is pleading the statutes of limitations to charges by the United States that it has fraudulently obtained title under this very statute to mineral lands, within this State, of the value of a billion dollars. This Court is now under mandate of the Supreme Court to enter a judgment which will confirm that fraudulent alleged title, absolutely, by a ruling that those mineral lands are included within the operations of the granting Act, which expressly declares that they are all excluded from its operations. If this Court certifies to the Supreme Court the question prayed in this petition to be certified, it will be relieved of the necessity of entering such judgment, for it is the law of the Constitution, which is the law of the people, that only Congress can change an Act of Congress.

Respectfully submitted,

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